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S. HRG. 101-764

SOFT DRINKS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 114

TO DECLARE CERTAIN ACTIVITIES OF MANUFACTURERS OF SOFT DRINKS TO BE UNFAIR ACTS OR PRACTICES FOR PURPOSES OF THE FEDERAL TRADE COMMISSION ACT

FEBRUARY 28, 1990

Printed for the use of the
Committee on Commerce, Science, and Transportation

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SOFT DRINK BILL

WEDNESDAY, FEBRUARY 28, 1990

U.S. SENATE,
SUBCOMMITTEE ON THE CONSUMER,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SR-253, Hon. Daniel K. Inouye presiding.

Staff members assigned to this hearing: Moses Boyd and Linda Lance, staff counsels; and Sherman Joyce, minority staff counsel.

OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. The hearing will please come to order. The bill before the Committee this morning, S. 114, declares certain activities of soft drink manufacturers to be unfair for the purposes of Section 5 of the Federal Trade Commission Act.

This bill prohibits certain acts of any person engaged in the business of manufacturing, selling or distributing post-mixed soft drink dispensing equipment, or engaged in the business of manufacturing, selling and bottling or otherwise distributing soft drink syrup, and will declare these certain acts to be unlawful acts that will promote monopolization, end of fair competition, and will ultimately hurt the consumer.

Over the years, independent soft drink distributors have served smaller outlets that large manufacturers did not serve, and these distributors supplied the equipment and syrup necessary to dispense soft drinks at bars, restaurants and fast food outlets.

However, in their efforts to further monopolize the soft drink market, large soft drink manufacturers have started to provide, at little or no cost, beverage-dispensing equipment to potentially large retail customers in order to lure them away from their current, independent distributors.

This creates an unspoken obligation on the part of the retail customer to purchase the soft drinks served from the large soft drink manufacturer who is providing this equipment. Furthermore, when these large syrup manufacturers install the beverage dispensing equipment at no charge, it is usually equipped to dispense only the syrup flavors that the manufacturer produces, and this leaves no room for the restaurant or tavern owner to dispense the soft drinks of a competitor.

The damage impact on the beverage-dispensing equipment industry is twofold. First, and most dramatically, it undermines the survival of those companies whose very existence is dependent upon the sale or lease of beverage-dispensing equipment.

When a large retailer of soft drinks such as a fast food chain is faced with a choice of buying or renting the beverage-dispensing equipment, or receiving it free of charge, there is little difficulty in making a decision, and the result is almost always the same: a member of the beverage-dispensing equipment industry loses another customer.

Secondly, once the equipment is installed, the customer invariably purchases the syrup directly and exclusively from the big soft drink manufacturer, thus the beverage-dispensing equipment industry is not the only victim of this anticompetitive practice. Consumers and other distributors suffer as well.

In the waning days of the 100th Congress I had the privilege of chairing a hearing on this bill before this Committee. We heard a great deal of testimony from individuals who have been in the business for 20 to 30 years. Many now stand at the brink of losing their businesses. The large manufacturers gave no indication of compromising or coming up with a viable solution, saying only that this is common practice.

Recently, I was contacted by an independent manufacturer who lost five contacts just in the past three weeks alone because of this practice, and it seems to me that the cola wars have not ended.

Unless action is taken to preserve what little competition remains in the fountain soft drink industry, these large manufacturers will totally eliminate competition and will decimate the beverage-dispensing equipment industry.

Currently, large manufacturers control 85 percent of the fountain-served market, leaving 15 percent to all other manufacturers, including other national brands. Less competition will inevitably be detrimental to the consumer in the long run.

I firmly believe that Congress must take a closer look into this matter. Both the Senate Judiciary and the Commerce Committees are studying this issue. I believe a fair assessment of the situation can be made, and it is my hope that the soft drink industry will work with both Committees to find a viable solution to preserve, if not enhance, competition.

[The bill follows:]

101ST CONGRESS
1ST SESSION

S. 114

To declare certain activities of manufacturers of soft drinks to be unfair acts or practices for purposes of the Federal Trade Commission Act.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. INOUYE introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JANUARY 31 (legislative day, JANUARY 3), 1989

Ordered referred jointly to the Committees on the Judiciary and Commerce, Science, and Transportation

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A BILL

To declare certain activities of manufacturers of soft drinks to be unfair acts or practices for purposes of the Federal Trade Commission Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) it is an unfair act or practice, for purposes of section 5 of the Federal Trade Commission Act (15 U.S.C. 45), for any person engaged in the business of manufacturing, selling, or distributing postmixed soft drink dispensing equipment or engaged in the business of manufacturing, selling, bottling, or otherwise distributing soft drink syrup, to induce (directly or

indirectly or through an affiliate), using any of the means described in subsection (b), any retailer engaged in the sale of postmixed soft drinks to purchase any soft drink syrup from such person to the exclusion in whole or in part of soft drink syrup sold or offered for sale by other persons in interstate or foreign commerce, if—

(1) such inducement is made in the course of interstate or foreign commerce;

(2) such person engages in the practice of using any such means to such an extent as substantially to restrain or prevent transactions in any soft drink syrup in interstate or foreign commerce;

(3) a direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any soft drink syrup to such retailer in interstate or foreign commerce; or

(4) a direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from furnishing, leasing, selling, or servicing any postmixed soft drink dispensing equipment or postmixed soft drink dispensing equipment systems to such retailer in interstate or foreign commerce.

(b) The means of inducement referred to in subsection (a), with respect to a retailer, are—

(1) furnishing without consideration, giving, or lending any postmixed soft drink dispensing equipment, postmixed soft drink dispensing equipment systems, fixtures, signs, supplies, money, services, or other things of more than nominal value to the retailer;

(2) leasing or selling at below fair market value, any postmixed soft drink dispensing equipment, postmixed soft drink dispensing equipment systems, fixtures, signs, supplies, money, credit, services, or other things of more than nominal value to the retailer; or

(3) extending credit to the retailer for a period in excess of the credit period that is usual and customary in the soft drink distribution industry for the particular class of transactions.

(c) As used in this Act, the term "postmixed soft drink dispensing equipment" means all of the components used to produce carbonated water and to mix soft drink syrup with carbonated water as the soft drink is dispensed from a faucet.

(d) Subsections (a), (b), and (c) shall take effect on the date which is sixty days after the date of enactment of this Act.

Senator INOUYE. This morning we have several witnesses before us, and first I am pleased to welcome the Deputy Director of the Bureau of Competition of the Federal Trade Commission, Miss Mary Lou Steptoe. Miss Steptoe, welcome, ma'am.

STATEMENT OF MARY LOU STEPTOE, DEPUTY DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Ms. STEPTOE. Thank you. Good morning, Mr. Chairman. As you said, I am Deputy Director of the Federal Trade Commission's Bureau of Competition, and with me on my right is Ron Rowe, who is Director for Litigation in the bureau, and Ron has been in charge of investigations and cases which the Commission has brought in the soft drink industry.

The views I am about to present are those both of the Bureau of Competition staff and the Federal Trade Commission as a whole. The FTC, of course, has a direct interest in the legislation, since we would be the agency responsible for implementing its terms.

Mr. Chairman, I am authorized to say that the Commission does not support enactment of this legislation. There are four basic reasons for this conclusion, which are set forth at length in the testimony previously supplied to the Subcommittee, and I will just summarize here this morning.

First, the discounting policies that the bill aims to prohibit are in many cases likely to be pro-consumer and not anticompetitive. They represent a creative alternative to direct price competition and thus introduce new modes of competition into the marketplace.

Secondly, the bill appears to be over-broad. Among other things, it would reach conduct not only of national syrup manufacturers—the big syrup manufacturers—but also wholesalers, distributors and local syrup manufacturers, regardless of their market power or lack thereof.

Thirdly, to the extent that some of the practices may raise anticompetitive concerns, the existing antitrust laws, we feel, are sufficient to deal with them. And finally, the bill as drafted contains a number of imperfectly-defined phrases that will be difficult to apply in ways that do not harm competition.

In the time allotted to me, I would like to focus on the last two points, which deal with the practical difficulties of implementing the bill. The Commission has concluded that a key difficulty with S. 114 is that any competitive problems in this industry are already adequately addressed by the existing laws.

The Commission bases this determination on knowledge of the workings of the carbonated soft drink distribution systems which have been gained over the course of several cases involving manufacturing, distribution and retail levels of this industry.

Although we have yet to come across illegal practices of the types that the bill is meant to reach, when we do so we feel we are equipped to challenge them. That is, each of the potentially harmful practices the bill addresses is already a violation of the antitrust laws.

Predatory pricing is a violation of both Section 2 of the Sherman Act and of the Robinson-Patman Act. Tying arrangements that reduce consumer welfare can violate Section 1 of the Sherman Act

and Section 3 of the Clayton Act, and Sherman Act Section 1 is also violated by agreements to bar competitors from access to essential inputs. In addition, of course, all of these types of practices violate Section 5 of the Federal Trade Commission Act.

The Commission feels that since these practices are already prohibited by law, there is no need to pass additional legislation which merely prohibits them in a specific industry.

This brings me to my second point. The bill contains imperfectly-defined language that will be difficult to apply without actually harming competition. Take leasing or selling, which is prohibited "at below fair market value" without defining fair market value, and if "fair market value" is taken to mean the price charged by others in the industry, it will mean the bill will effectively eliminate competition by forcing everyone to charge the same price.

Alternatively, "fair market value" could mean some cost or profit standard set by the government, but that involves us in establishing a form of government price control and price rigidity.

A second definitional problem concerns credit, extending credit to retailers, which is proscribed if it lasts longer than the usual and customary time period, again not defining "usual and customary." To the extent that this phrase requires or promotes identical credit terms, it, too, will inhibit price competition.

It might also, frankly, be very difficult for a creditor to comply with this requirement since he or she is unlikely to have access to a competitor's credit terms, nor would we really want them to have that access.

In the final point I would like to make is that the Commission is concerned about the procedural precedent the bill might set. Most of the antitrust laws are expressed in terms of general principles which courts and agencies then apply to the facts of a particular case.

To incorporate into the antitrust statutes an industry-specific directive, as S. 114 would do, could introduce a lot of rigidity into our national competition policy and would be contrary to the approach that has customarily guided policy in the past.

That concludes my prepared testimony, Mr. Chairman, and I appreciate you giving me the opportunity to give it. I am ready to answer questions.

[The statement and questions and answers follow:]

STATEMENT OF MARY LOU STEPTOE, DEPUTY DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Good morning, Mr. Chairman and members of the Subcommittee. My name is Mary Lou Steptoe. I am Deputy Director of the Federal Trade Commission's Bureau of Competition.

It is a pleasure for me to be here to testify on S.114. The views on this bill that I am about to express are those both of the Bureau staff and also of the Federal Trade Commission itself. We have, of course, a direct interest in this legislation, since we would be the agency responsible for implementing its terms.

Mr. Chairman, we do not support enactment of this legislation. There are four reasons for our conclusion. First, the discounting policies that the bill aims to prohibit are, in most cases, likely to be proconsumer and not anticompetitive. Second, to the extent that some of these practices may raise anticompetitive concerns, the existing antitrust laws are sufficient to deal with them. Third, the bill appears to be overbroad. Fourth, the bill as drafted contains a number of imperfectly-defined phrases that will be difficult to apply in ways that do not harm competition. I will elaborate on each of those points in a moment.

Description of S.114

Let me first summarize the bill itself, however. S.114 would make it an unfair act or practice within the meaning of the

FTC Act for any person engaged in the sale of dispensing equipment or soft drink syrup to induce retailers to purchase syrup from it, to the exclusion of other sellers, through certain promotional practices. Specifically, the bill would prohibit suppliers from offering retailers soft drink dispensing equipment (or other valuable items such as "fixtures, signs, supplies, money [or] services") at less than their fair market value, and it would also prohibit suppliers from extending credit to retailers for a period in excess of that customary in the industry. Thus the bill would prohibit firms from competing with respect to several important aspects of product distribution, such as the equipment used or the terms of credit offered.

The conduct is generally procompetitive

We believe that the conduct prohibited by S.114 generally is beneficial to consumers. The offer of dispensing equipment or other consideration is a form of a discount from the price at which soft drink syrup is sold to retailers, and therefore is a form of price competition. Some large retailers, such as fast food chains, may receive their discounts directly in the form of lower syrup prices. However, whether the discount is granted in the form of equipment, cash payments, advertising subsidies, or other items of value on the one hand, or a lower syrup price on the other, it reflects price and service competition among soft drink distributors. The fact that the discount sometimes takes the form of providing dispensing equipment at no separate charge

is a creative alternative to direct price competition, and presumably reflects the preferences of the participants in the transactions. For example, food service operators would have to make larger capital outlays if subsidies for dispensing equipment were prohibited; that larger outlay would be a concern in an industry dominated by small entities with a high failure rate. Some other retailers may simply find it more efficient to obtain their syrup and dispensing equipment from a single source. Suppliers may similarly find it more efficient to provide both products at once.

In the hearings on a similar proposal in the last Congress, proponents of the bill expressed the view that the provision of subsidized dispensing equipment amounts to below-cost, or predatory, pricing. This view, however, assumes that soft drink dispensing equipment and soft drink syrup are two distinct products, and that the equipment is sold below cost and the syrup at a profit. The transactions can also be viewed as sales of two separate inputs used to produce a single final product. Therefore, firms that do not supply "free" dispensing equipment could still compete with firms that do by offering a price on syrup that, when combined with the retailer's expenditures on the purchase of dispensing equipment from a third party, yields a lower price per unit of post-mixed soft drinks. Since these non-integrated firms will not have the overhead expense of the dispensing equipment, they will presumably be able to charge correspondingly less for the syrup itself.

The manufacturers of dispensing equipment should likewise remain able to compete. These firms would be in a position to sell their products to soft drink retailers or, in any case, to the syrup suppliers. Indeed, if the challenged practices offer substantial efficiencies they could actually increase the demand for dispensing equipment.

The persons who might feel an adverse impact from "free" dispensing equipment are the distributors who previously had been marketing such equipment independently to retail outlets. That impact, however, may simply be the side effect of the greater efficiency and cost savings associated with the provision of dispensing equipment and syrup by a single supplier. A similar effect may be observed whenever vertical integration eliminates an intermediate level of distribution. Overall competition and consumers are best served by letting this process take place unimpeded.

Problems are addressed by existing laws

A second difficulty with S.114 is that any real competitive problems in this industry are adequately addressed by existing laws. We have gained experience in this subject in the course of handling several actions involving carbonated soft drink markets. We recognize that, given certain conditions, it would be theoretically possible for suppliers with monopoly power to use subsidized dispensing equipment as a means of facilitating an

efficiency-reducing tie-in among various soft drink syrups.[1] We have not seen evidence of such conditions or practices in our law-enforcement activities, however.

I note, moreover, that each of the potentially harmful practices that the bill addresses already is a violation of the antitrust laws. For example, predatory pricing can violate section 2 of the Sherman Act and also the Robinson-Patman Act; tying arrangements that reduce consumer welfare violate section 1 of the Sherman Act and may violate section 3 of the Clayton Act; and agreements to foreclose competitors from access to essential inputs violate section 1 of the Sherman Act. In addition, all three types of practices violate section 5 of the FTC Act. Since these practices already are prohibited by law, there is no need to pass additional legislation to further prohibit the practices as they might take place in a specific industry.

The bill appears to be overbroad

This leads to a third issue. We believe that even if the legislation might halt some harmful practice, it would nonetheless be overbroad. The bill would not prohibit the specified practices only when they adversely affect competition. The bill is not limited to circumstances where, in order to receive some discount, a purchaser explicitly agrees to refrain

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[1] An unlawful tying arrangement or tie-in occurs when a supplier has a monopoly or market power in one product (the "tying" product) and uses that power to control the price or purchase terms of a second product (the "tied" product).

from buying from all other suppliers. Rather, it prohibits any offers that would have the practical effect of excluding any competitor from making a sale -- any one sale -- to a retailer. Imagine the case of a supplier who loans a small dispensing unit to a major restaurant that has many such units. S.114 would be violated if the seller requires that its syrup be used in its machine, even though many other dispensers in the same restaurant remain open to competition, and even though the diversion of business caused by the arrangement is too small to threaten the viability of any competing supplier. In the language of the bill, the arrangement will necessarily lead "to the exclusion in whole or in part of soft drink syrup sold or offered for sale by other persons . . . ." S.114, § (a). We believe that this aspect of the bill is overbroad, and could prohibit arrangements that are in the interests of buyers, sellers, and consumers, and that do not threaten any harm to competition.

Contributing to the overbreadth of S.114 is the fact that it will apply to syrup suppliers at all levels of the distribution chain. The preamble to the bill declares that it is aimed at the conduct of "manufacturers" of soft drinks. As drafted, however, the bill would apparently not be limited to the national syrup manufacturers, but would also govern the conduct of wholesalers, local distributors, and even the local manufacturers of specialty drinks.

The further prohibition on offering discounts in the form of signs, supplies, money, services, or credit terms is especially

troublesome to us. There seems very little basis in the legislative record for this prohibition. There is little reason to believe that any of these types of discounts could be used for anticompetitive purposes, and no such reason was persuasively suggested by the hearings on the predecessor bill, which focused on the assertedly exclusionary effect of providing dispensing equipment. Again, I suggest that the offering of any one or all of these inducements is most probably a creative form of price competition.

The bill contains indefinite language

Finally, the bill as drafted contains imperfectly-defined language that would be difficult to apply without harming competition. Leasing or selling "at below fair market value" is proscribed but "fair market value" is not defined. If "fair market value" is taken to mean the price charged by others in the market, the effect of the bill would be to eliminate competition. If "fair market value" is taken to mean some cost or profit formula set by statute or government agency decision, the effect of the bill would be to establish a form of government price control.

Extending credit to the retailer is also proscribed if it lasts for a period in excess of that which is "usual and customary." "Usual and customary" is not defined. To the extent that this phrase requires or promotes identical credit terms it would in fact be dampening a form of competition. It might also

be very difficult for a creditor to comply with this requirement, because he or she is unlikely to have access to competitors' credit terms.

Conclusion

This brings me almost to the end of my remarks. Let me just emphasize two points in conclusion.

First, we do not believe that a persuasive substantive case has been made for this bill. It appears to us that most promotional loans of equipment actually represent a form of beneficial price competition, and, to the extent that residual anticompetitive problems exist, it appears that they can be adequately addressed under existing law.

Second, we are concerned about the procedural precedent that this bill might set. Most of the antitrust laws are expressed in terms of general principles, which courts or administrative agencies then apply to the facts of a particular case. To incorporate into the antitrust statutes an industry-specific directive, however, as S.114 would do, could introduce great rigidity into our national competition policy, and would be contrary to the approach that has customarily guided that policy in the past.

This concludes my prepared testimony, Mr. Chairman. I very much appreciate having had the opportunity to present it. At this time I would be happy to address any questions that you or the other members of the Subcommittee might have.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

BUREAU OF COMPETITION

APR 3 1990

The Honorable Richard H. Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science
and Transportation
Room 227, Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for Senator Inouye's letter of March 9, 1990, asking me to respond to several questions relating to the issues in S. 114. The questions and my answers are set out below.

1. (A) Does the Federal Trade Commission have any kind of policy, or any guidelines limiting the free transfer of soft drink franchises from one local bottler to another?

The Commission does not have any guidelines specifically relating to soft drink franchise transfers. Section 7 of the Clayton Act, 15 U.S.C. § 18 (1988) and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1988), however, authorize the Commission to take appropriate enforcement action to prevent the anticompetitive transfer of soft drink franchises. In addition, the *Merger Guidelines of the Department of Justice*, 4 Trade Reg. Rep. (CCH) ¶ 13,103 (June 14, 1984), and the *FTC Statement Concerning Horizontal Mergers*, 4 Trade Reg. Rep. (CCH) ¶ 13,200 (1982), as well as court and Commission decisions offer guidance on the Commission's analysis of mergers and acquisitions that may have anticompetitive effects.

Recent Commission actions concerning the soft drink industry illustrate the Commission's concern about possible anti-competitive effects of soft drink acquisitions. Since 1986, the Commission has issued four complaints involving horizontal soft drink acquisitions and successfully prosecuted one federal court preliminary injunction action to block such an acquisition prior to its consummation. They are as follows: the Commission's complaint (D. 9207) against The Coca-Cola Company for its proposed acquisition of the Dr Pepper Company (preliminary injunction granted by federal district judge in the District of Columbia); the Commission's complaint (D. 9215) against the Coca-Cola Bottling Company of the Southwest for its acquisition of the Dr Pepper and Canada Dry franchises; the Commission's complaint

(C. 3256), involving Pepsi-Co., Inc.'s proposed acquisition of the Dr Pepper, Seven-Up and other franchises in the Broward County, Florida and the Staunton, Virginia areas (consent order accepted in 1989); and the Commission's complaint (D. 9233) against Harold Honickman, *et al.*, a New York City Pepsi bottler, for his acquisition of the Seven-Up Brooklyn Bottling Company, Inc.

In 1986, the Commission not only obtained a preliminary injunction against The Coca-Cola Company's proposed acquisition of the Dr Pepper Company; the Commission also directed its staff to file a federal court preliminary injunction action against PepsiCo., Inc.'s proposed acquisition of the Seven-Up Corporation. Upon being advised of the Commission's intention to block its takeover of 7-Up, PepsiCo abandoned the transaction.

(B) If so, how was this policy or guideline formulated: If it were not formulated through a rulemaking proceeding with the opportunity for public comment, could you please explain why it was not formulated in this manner?

Specific developments in merger policy are typically a matter of case law development; the soft drink industry is no exception. This case-by-case development of merger precedent in any given industry is the product of an adjudicative process that gives respondents many opportunities to present their arguments to a variety of unbiased tribunals before final action is taken. The Commission may issue an administrative complaint or file a preliminary injunction action in federal court if it has reason to believe that the law has been or would be violated by an acquisition or an agreement to consolidate. An administrative law judge presides over a trial on the merits of a Commission administrative complaint. The parties to the proceeding have a right to appeal the decision to the Commission. The respondents in a Commission administrative proceeding also have the right to appeal an unfavorable Commission ruling directly to a United States Court of Appeals.

Parties also may offer to enter into a consent agreement to settle an administrative complaint or prevent an FTC preliminary injunction action. The Commission may accept such a consent agreement for public comment. The Commission then publishes the agreement in the Federal Register and accepts comments, typically for 60 days. After reviewing the comments, the Commission decides whether to issue a consent decree in final form, to require the respondents to modify the agreement, or to reject the agreement and take appropriate enforcement action.

(C) To what extent, does the Federal Trade Commission consider the effect of such franchise transfers on competition among soft drink syrup manufacturers in formulating and implementing its policies regarding such transfers?

A Commission investigation of a franchise transfer evaluates all relevant factors affecting competition in the market. So the Commission does consider the effect on competition at the concentrate or syrup level of the carbonated soft drink industry as well as the soft drink distribution level. This analysis includes an assessment of whether a transfer will have an adverse impact on soft drink concentrate output or prices.

(D) Has the Commission's policy been applied equally to soft drink manufacturers, regardless of their size (both large and small manufacturers)?

The Commission applies the enforcement policy discussed in my responses to the previous questions in analyzing all soft drink acquisitions and mergers which come before it. Commission staff examines any franchise transfer that parties file under the Hart-Scott-Rodino Act. Staff also may receive notice through public sources. Many franchise transfers, however, do not meet the filing requirements under the Hart-Scott-Rodino Act and may not come to the attention of staff. However, if these acquisitions later come to the staff's attention and they present the possibility of competitive harm, the staff will investigate them and recommend appropriate Commission action.

(E) How has the Commission insured that its policy is consistent with the objectives of the Soft Drink Interbrand Competition Act of 1980, and with the intent of Congress in enacting the legislation?

The Soft Drink Interbrand Competition Act exempts exclusive franchise distribution arrangements from the antitrust laws, so long as there is substantial and effective interbrand competition in the market. We see no conflict between the Soft Drink Interbrand Competition Act of 1980 and the Commission's enforcement of Section 7 of the Clayton Act. To the contrary, vigorous enforcement of the Clayton Act against anticompetitive horizontal acquisitions will, in fact, preserve interbrand competition and thus serve the objectives of the Soft Drink Interbrand Competition Act.

2. As you know, the two dominant forces in the soft drink market are Coke and Pepsi. It has been stated that these two manufacturers alone control 85% of the soft drink business in this country, and that their market share is ever-increasing. Is there any concern within the FTC about this increasing dominance in the soft drink market by these manufacturers: If the market share of these two manufacturers did increase, could this have an adverse effect on the entire soft drink market and the interest of consumers?

Yes, staff believes that an increase in the market share of Coke and Pepsi could have an adverse effect on the entire soft drink market and the interest of consumers. As I described in my answer to 1. (A), several Commission actions also show that the Commission has reason to believe that an increase in Coke's or Pepsi's market share may tend to lessen competition in the soft drink industry. This includes the Commission's actions to prevent The Coca-Cola Company from buying Dr Pepper and PepsiCo from buying Seven-Up. Indeed, the Commission issued its complaint against the Coke-Dr Pepper acquisition, and has refused to dismiss the complaint even following Coke's abandonment of its plans to acquire Dr Pepper. The Commission directed staff to continue to seek an order requiring Coke to submit future proposed acquisitions for prior Commission approval or disapproval, regardless of the size or market share of the acquired party. (See Commission Order Denying Motion to Dismiss in Docket 9207.)

3. It has been claimed by some persons within the soft drink industry that large manufacturers like Coke and Pepsi can afford to provide free dispensing equipment to retailers because of their market dominance and large profits in other areas. The concern is that these large manufacturers are using the equipment giveaway programs, not so much for profits, but to keep smaller competitors from gaining any access or edge in the market. What is your opinion of this claim? Do you think this is a legitimate concern?

That Coke and Pepsi would provide free dispensing equipment to create entry barriers into the fountain market is a matter of legitimate concern. Providing free dispensing equipment, however, is like providing a price discount. Where a competitive act amounts to little more than lowering the price, it is very difficult to distinguish competition on the merits from a predatory act. The fact that these practices exist may indicate a preference of buyers and sellers. In the Consumer Subcommittee hearing on S. 2347 in 1988, for example, Richard Crawford, speaking on behalf of the National Restaurant Association,

pointed out that individual food service operators might not find it cost-effective to make the capital outlay required to purchase fountain dispensing equipment. These retailers might prefer to purchase their syrup and dispensing equipment from a single source. Because it is likely that the parties to such transactions view soft drink dispensing equipment and soft drink ingredients as a single product, free dispensing equipment merely lowers the overall price of that product. In this case, if retailers were forced to pay for dispensing equipment, they might have to raise the price of soft drinks or cut back other services.

4. Can you offer any evidence to support your contention that promotional loan equipment programs actually represent a form of beneficial price competition?

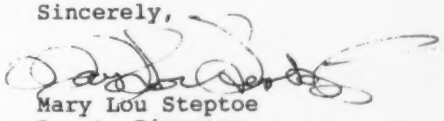
As indicated by the answer to the previous question, the staff believes that, generally, promotional loan equipment programs are a form of competition. We have no data comparing transactions where such equipment programs exist with those where only price discounts are given, so as to measure the net effects of each on competition and competitors. On the other hand, there are reasons to believe that these programs benefit consumers in the form of lower prices. Those reasons are described above and in my prepared statement on S. 114.

5. You stated in your testimony that it is theoretically possible for suppliers with monopoly power to use subsidized equipment to control prices and purchase terms of a particular product. Could you please describe and give an example of how this could occur?

Even as a theoretical matter, the conditions under which the provision of dispensing equipment can be anticompetitive are unusual. At a minimum, the market must have only one bottler that offers a full line of soft drink syrups (cola, lemon-lime, diet drinks, etc.) and that conditions the use of its equipment on the purchase of its full line of syrups. If substantial differences exist in the demand for different syrups, a bottler with a full line of syrups might provide dispensing equipment to purchasers to facilitate a tying arrangement between syrups in which it enjoys a monopoly and syrups in which it competes with other bottlers. Such an arrangement could possibly harm consumers. Cases rarely satisfy these minimum conditions, however. For example, Coke and Pepsi bottlers compete in every market and these markets therefore do not appear to fit the hypothetical's requirement of only one full-line bottler. However, if an anticompetitive tying situation were to be found, it would be unlawful under the existing antitrust laws.

I hope I have fully responded to all your questions. Please let us know whenever we can be of service.

Sincerely,



Mary Lou Steptoe
Deputy Director

Senator INOUYE. So you think there is nothing wrong with the industry and that what is happening is just plain American business?

Ms. STEPTOE. Well, I do not think there is nothing wrong with the industry as a whole. We are particularly vigilant in this area. The practice of supplying soft drink dispensing equipment or special credit terms we view as one aspect of the bundle of supplying syrup, and a person may choose to supply just the syrup, or just the syrup plus these other incentives, but when you look at the price collectively it comes down to a competitive price.

In other words, a competitor can choose what he wishes to offer—a collection of services and product, or the product alone—but ultimately, when you unbundle the pieces and add them up, it is all going to come down to the same competitive price if he is going to stay in business.

Senator INOUYE. You people have investigated this?

Ms. STEPTOE. I will have to turn to Ron for that.

Mr. ROWE. The Commission and the Bureau of Competition receive allegations similar to the types of predatory pricing allegations that you see in this and many industries.

Many of our investigations focusing on the issue of predatory pricing under the established case law have to determine whether or not this has an effect on competition: whether or not a company that engages in a practice which is alleged as predatory connected to price will drive competitors from the market in such a way that the competitor that uses the practice will be able to raise prices or recoup the loss of the price discount, or of the giving away of free equipment. If they cannot do this, then they cannot be successful and competition will not be harmed.

Therefore, when we see those allegations, we use a lens of determining whether or not there is a profit-maximizing motive. If a company that lowers its prices or gives away free equipment is unlikely to be able to raise prices in the long run, the courts and the Commission have held in a series of cases that this is not a violation of the antitrust laws.

In your 1988 hearing, someone asked the question of a witness, whether or not the practices which were addressed by the bill had resulted in higher or lower prices, and the answer seemed to be that the wholesale prices had dropped and the prices of syrup and cola had dropped, but the restauranteurs who had gotten the discounts were not passing them on. If there is a problem, then it would seem that it might be at that level, and restaurant competition being what it is, I suspect that in competitive markets those price discounts are passed on.

Senator INOUYE. So you believe that this is just plain old American practice, to provide free dispensing equipment?

Ms. STEPTOE. I think it is a creative form of competition, yes, sir.

Senator INOUYE. At the present time, Pepsi and Coca-Cola I believe control about 85 percent of the market. What was it ten years ago?

Ms. STEPTOE. Even ten years ago those two were dominant. I am not sure about 50 years ago.

Senator INOUYE. I mean ten years ago.

Ms. STEPTOE. Even ten years ago.

Senator INOUYE. Do you have any numbers?

Mr. ROWE. The numbers have been fairly stable over the years. The two companies have shared—or rather, their bottlers, because they sell through bottlers of exclusive franchises who carry Coca-Cola products and sometimes other products, so it is very difficult to measure market share, but in terms of concentrate sold it is even more difficult, for concentrate can be used for a number of things, including snow cones and that kind of thing.

A good proxy for carbonated soft drink competition is looking at the bottlers' sales across counties, which are usually kept in retailer-paid-for studies of price checking, and those market shares have remained stable for the two leading firms over time. Coke has most of the time been number one, but sometimes Pepsi has passed it, as in 1986 when Coke introduced the debacle of "New Coke."

Senator INOUYE. Is this the policy held by the FTC on all give-aways? Do you consider all give-aways of free equipment as being part of the promotional programs?

Ms. STEPTOE. I think yes, generally. A give-away, or a giving at a reduced cost, of free equipment or different credit terms would generally be seen as being a portion of the bundle of the product that is being sold.

The exceptions would be in some situation where it was truly predatory pricing, or it was truly a separate product and you might possibly get into a tying problem. As I indicated, the antitrust laws can reach this practice, but the requirements would have to be case-specific.

Senator INOUYE. Have you received any complaints or petitions about the practices alleged by supporters of this measure?

Mr. ROWE. Yes. We received complaints similar to that, not in only this, but in other industries as well.

Senator INOUYE. What was the nature of the complaint, in what particulars?

Mr. ROWE. Without indicating specific complaints or identifying the complainants, a generic type of complaint would be that the bottlers—the Coke and Pepsi bottlers in various markets—are capable of giving price concessions, and read that to mean including free equipment, that cannot be matched by either the syrup manufacturers of non-Coke and Pepsi brands or by the local bottlers who do not carry Coke and Pepsi brands.

Senator INOUYE. What was the response, or the reaction on the part of your agency?

Mr. ROWE. Well, I cannot discuss specific investigations that are going on now, but as a generic matter, referring back to my previous response to a previous question, we look at those complaints through the lens of determining whether or not the price discounts—again, read free equipment or otherwise—will lead the companies giving them to a future in which they will be able to raise prices if the companies who are complaining and are unable to compete are driven from the market. Again, the case law——

Senator INOUYE. You do not believe that they would be driven out of the market? If I provided you with free equipment just to buy my syrup and another company said that you had to buy the equipment, which would you take, mine or his?

Ms. STEPTOE. Sir, I think it is also the same that if you offered me the product at 20 cents below what the other company was offering, I might very well go for that as well; but the fact that one company is capable, because it is more efficient or it has deeper pockets, or better credit lines, of offering a lower price is not anticompetitive. In fact, it is generally assumed to help consumers.

Senator INOUYE. What if it is below cost of production?

Ms. STEPTOE. If it is truly below cost, then it may be a predatory pricing issue.

Senator INOUYE. What is truly below cost?

Ms. STEPTOE. Lawyers and economists have struggled with that quite a bit. It is difficult. There are a number of benchmarks floating around at the courts, but in general the principle is what Ron has already said, is that it has to be generally considered to be below average variable cost, by which it is meant that you will engage in harm now—the seller will be harmed now but will put up with it in the notion of being able to recoup later, when he achieves monopoly power.

Mr. ROWE. Chairman Inouye, I would like to point out also that for years these complaints have been made by companies who are still in the industry, but one of the facts that you look at in just examining complaints of this type is that you have two market leaders in this industry, both Coke and Pepsi, and you have to ask yourself whether Coke or Pepsi individually would engage in such behavior with the expectation that after they had driven some particular rival of theirs from the market that Pepsi or Coke, on the other hand, would simply go along with the price rise.

The history of pricing in carbonated soft drinks over the years has been that the real price of carbonated soft drinks sold as a reasonable proxy at the bottling level appears to have declined, gone down.

So there appears to be a history of price competition, and quite effective price competition at the local level, unless there were collusive predation, some kind of a conspiracy between Coke and Pepsi to engage in this type of behavior because they have somehow decided that they wanted to drive soda fountain dispensing equipment manufacturers out of business, which we have no evidence to support, that theory just will not indicate a violation of the antitrust laws.

Senator INOUYE. You may not have evidence of such collusion, but are these manufacturers of soda dispensing equipment flourishing today, or is it part of Americana and you find it only in museums?

Mr. ROWE. As the statement indicates, Mr. Chairman, the soda dispensing equipment manufacturers are still selling them, and sell them, among other people, to Coke and Pepsi.

Senator INOUYE. Do you think their business is flourishing today, or have they been on the downgrade for the past 10 years?

Mr. ROWE. I truly do not know.

Senator INOUYE. So we have no idea whether the practices have had a negative effect on these people, as far as you are concerned?

Mr. ROWE. Well, in terms of looking at it as to whether or not the cola companies are using this as a practice to target soda dispensing equipment manufacturers or distributors, the distributors

may be harmed, but there is no indication that the manufacturers themselves, from what we can see, are being harmed.

Senator INOUYE. I have several questions that may be a bit complex and technical at this stage to be asking at this forum. May I submit them to you for your consideration?

Ms. STEPTOE. We would be happy to respond to them.

Senator INOUYE. And I have been advised there are several members of the committee who would like to submit questions.

Ms. STEPTOE. We would be happy to respond to any questions.

Senator INOUYE. Thank you very much.

I thank you, Ms. Steptoe.

Now for the first panel, Mr. Stanley Bregman, of Washington, D.C.; Mr. Douglas S. Damon of Damon Distributors of Sparks, Nevada; Mr. Brook R. Jason, President of Jason Soda Systems of South Windsor, Connecticut; Mr. Mark A. Imbesi, General Manager of the Imbesi Bottling Group of Bridgeton, New Jersey; Mr. H. Ronald Harris, President of Better Beverages/Bar Master of Cerritos, California.

Gentlemen, I welcome you.

STATEMENT OF STANLEY I. BREGMAN, COUNSEL, COMMITTEE AGAINST EQUIPMENT GIVE-AWAYS

Mr. BREGMAN. Thank you, Mr. Chairman.

I am counsel for the Committee Against Equipment Give-Aways. And on behalf of the committee, I wish to thank you, sir, for your leadership on this issue, and for proposing S. 114. I believe your statement opening the hearing accurately described the situation.

The opposition to this bill and those that are proponents of the give-away programs will tell you that you are singling out one industry in the food service industry. If you did that and prohibited the give-aways on soda equipment, you would also have to do the same on coffee machines, water machines, pizza ovens, and what have you.

Sir, I respectfully submit that that argument is without merit. There are very few industries, if any, in the United States where there are just two dominant companies that have such economic power within that industry and that operate, basically, out of heedless self-interest.

There are ample and several precedents in the laws of the United States, which prohibit give-away programs. Such as in the alcoholic beverage industry, which Congress saw fit to prohibit the give-away of equipment or anything else of value in the alcoholic beverage industry.

Also, the State of Wisconsin has passed legislation, and it is on the books in the State, which prohibits the give-away programs of soda dispensing equipment.

Senator INOUYE. Was that upheld in the courts?

Mr. BREGMAN. Yes, sir. It is on the books today.

As I said, basically, the program of give-aways is one of heedless self-interest. I am old enough to remember the 1937 inaugural address of Franklin Roosevelt when he said, "We have always known that heedless self-interest was bad morals, but now we know it is bad economics."

That is the situation that we are faced with in this industry, sir, and we hope that we can have a program that will not be bad economics. That is why we support this bill.

Thank you very much, sir.

Senator INOUYE. Since the consideration of a similar bill in the 100th Congress, have you had discussions with the large manufacturers?

Mr. BREGMAN. Sir, I have talked with some representatives of the large manufacturers. I asked them if they would like to talk and discuss this in any further detail and possibly work on legislation together. They said they would get back to me, maybe. But I have not heard from them.

Senator INOUYE. Thank you very much, Mr. Bregman.

Mr. Damon.

STATEMENT OF DOUGLAS S. DAMON, DAMON DISTRIBUTORS, SPARKS, NEVADA

Mr. DAMON. Thank you, Chairman Inouye.

My name is Doug Damon of Damon Industries in Sparks, Nevada.

I testified previously in the last session of Congress on this bill. Regrettably, nothing has changed in my situation. At that time, I pointed out that I was in fact driven out of the former base of my business by this unfair trade practice. That is still the case. The thing that keeps me going in business is diversification into other areas.

I would like to take exception with what the previous speaker from the FTC said, in that it has not caused any harm. I am an example of harm that has been caused by unfair trade practices.

And secondly, I would like to submit that if there is legislation on the books that would preclude these practices, where are they? The practice goes on and it continues to go on.

I just take complete exception with that.

We were formerly in the business of not only manufacturing our own types of generic syrups and in the business of being a Coca-Cola wholesaler, we also were in the business of leasing, selling, and renting dispensing equipment where we could.

It has been a number of years since we have been able to lease any equipment or sell any equipment because of the give-away programs of Coca-Cola and Pepsi. My market is in a casino environment, which has a large soda business. The casinos use a lot of syrup.

The pricing of the syrup, I can tell you, is at cost, what the cost to the wholesaler would be of Coca-Cola. In addition to that, equipment is given away. And it goes beyond beverage dispensing equipment to wrap up the business. I have seen ice machines given away or loaned, whatever you want to call it, vending machines, and portable bars, which cost about $4,000 a piece.

I have seen cash given to accounts in the form of what they call transition allowances to convert the account over. And a number of other practices that I am just not in a position to deal with, one, because we do not have the cash flow to do that; and two, because

no bank would capitalize such expenditures for me because the return on investment just does not make any sense.

And I submit to you if Congress does not give relief to businesses such as ours, not only will these types of business suffer, so will the consumer. At some point, Coca-Cola and Pepsi are going to be the only soft drink companies left in this country. I really strongly believe that. I think there is historical precedent for it in other areas. And if the Congress does not give the relief, this will happen.

When it happens, I believe there is also historical precedent that the price of syrup will start going up dramatically. And as an example of this, in our industry it is a proven fact that on-premise sale—or syrup sale is rapidly increasing as a total percentage of the market, as opposed to the cans and bottles that are sold in the supermarkets.

For the Coke and Pepsi bottlers to continue to be as profitable in post-mix, they are going to have to raise the prices of five gallons of syrup from, in the neighborhood of my market, $25, which is indeed below cost the way I see it, to $88, to generate the same type of profit.

The consumer is the person that this is going to be passed along to. And that will happen when the independent wholesalers are not there to check the market.

The other thing that I would want to throw in here, as far as equipment manufacturers are concerned, and I know there is some forthcoming testimony in this regard, but there are equipment manufacturers who are not favored by the Coca-Cola and Pepsi Cola business, and they are very greatly adversely impacted by this practice, contrary to what was said by the previous speaker.

The future for me in my own market is to exclude Coca-Cola and Pepsi Cola from garnering new syrup business by these unfair trade practices. And it does not really matter what the size of the account is, they will do what they need to do. And I recognize that this is not a personal reflection on me, but I am in the middle of a cola war.

Fortunately, as I said, we have diversified into other areas that have helped us keep our business going. There is no doubt, Senator, that had I not done this, my business would have been closed a couple of years ago.

I appreciate being here, and thank you very kindly for your ear.

[The statement follows:]

STATEMENT
OF

DOUGLAS S. DAMON

Mr. Chairman, my name is Douglas S. Damon. I am president of Damon Distributing Company and I am appearing here today in support of S114.

Damon Distributing Company is located in Sparks, Nevada. We have been in the business of manufacturing syrup concentrates for many years. We were, until Coca-Cola and Pepsi Cola began giving away dispensing equipment, also in the business of selling, leasing and renting fountain equipment that dispenses soft drinks.

We have not placed a lease or sold a complete dispensing unit in five years. Why should a customer spend money on equipment when he can have Coca Cola or Pepsi Cola place not only soft drink equipment, but also ice makers, liquor equipment, vending machines, advertising materials, beer equipment, and yes, even cash up front. The bottling companies do not make a profit when they present these programs, but they are able to garner massive infusions of cash from other departments. They chalk up the losses to advertising and promotion. We have to make a profit. When we are gone, does anybody suppose that Coke and Pepsi are not going to one day decide to become profitable in these areas. If they do, who is going to restrict the potentially excessive levels of profitability? It won't be companies like mine because we will be out of business.

Because I cannot afford to loan equipment, I have seen a steady deterioration in my syrup sales. If Coke and Pepsi provide equipment they demand that the customer use their respective syrup products. This locks me out. I have had to diversify or die. The road has not been an easy one.

Regrettably, on September 1st of this year, I was notified by a large casino account at Lake Tahoe, Nevada, that all of their soft drink syrups would henceforth be procured from the Coca Cola Bottler. We had enjoyed that business for 15 years. This changeover has proved to be the final chapter to a story that has been going on for years, but intensified about three years ago. I am now effectively out of the Coca Cola business. This loss was the proverbial "straw that broke the camel's back."

The account to which I refer was at its height a $10,000 per month syrup account. Why did I lose the account? It was not because of poor service. The account's people will admit that our service department's performance was exemplary. It was not because of the price of the syrup product. Our prices were as much as 25% lower. Very simply put, it was because we would not install and loan beverage dispensing equipment at no charge. Nor would we provide additional monies, called transitional allowances, to keep the account. From a return on investment standpoint, it did not make sense to me. The cost of the equipment was too great and the return, too small.

My market area contains a small population base of less than 500,000 people, but includes a significant number of large volume accounts that attract significant numbers of customers - i.e. casinos and ski resorts.

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Traditionally, we were favored with a fair proportion of the casino business. We were so favored because we specialized in the service of their dispensing equipment to a greater degree than the bottlers and because we manufactured our own line of quality syrups that were favorably priced over our competitor's products. For a number of years, we maintained our competitive edge in these accounts. A typical scenario to secure a casino account would be to sell Coca Cola products at or near cost and our own flavor line at a price that generated a reasonable profit. Under normal circumstances Coca Cola and Pepsi Cola could not match our own flavors in price so we were able to maintain a precarious balance in the marketplace. Then, the "cola wars" began to intensify. Coca Cola and Pepsi, in the course of battling each other, stumbled across my Achilles heel. Very simply, they found that if they loaned equipment to the account at no charge (all paper maneuvering and accounting extrapolations aside) they could displace me as that account's vendor. Once the bottlers found that my accounts, for cash flow reasons, were willing to pay more money for product in the long run to preserve short term cash flow, their efforts to displace us as suppliers were relentless. The end results were predictably disastrous for me. Within a year, my soft drink syrup base in the casino market was decimated. My soft drink share of business has been decreased about $50,000 per month or about fifty percent of my total business.

You may ask the question, why don't I loan equipment to the account as the bottlers do. The reason I don't is twofold. First, I am a small company that does not have the capital reserves to lay out as much as $50,000 in free equipment to secure a large account. I could not even comfortably lay out $1,000 to outfit a small cocktail lounge with free equipment and justify the outlay in terms of reasonable return on investment. Second, no monied individual or banking firm is going to capitalize me so that I can loan the equipment on an equal footing with Coke and Pepsi. The reason these lending institutions won't capitalize is that the return on investment is simply not there. This brings me to a point and I believe it is a very important point. The bottlers do not seem to think that at this juncture they have to be profitable in their syrup business. Many of them are not profitable now, but can afford to wait. As post mix syrup takes a greater share of soft drink sales, those non profitable post mix syrup operators are guaranteed to become profitable. This will become very easy without companies such as mine in every market. Who, then, is going to suffer. I submit to you that it will be the consumer. Until recently, us "little fella's" have been a great check on the giants in most markets.

It goes without saying that to sell, lease, or rent beverage dispensing equipment in my market is a business opportunity that I have not enjoyed for a number of years. Coke and Pepsi are even going after the small tavern accounts with their free

equipment now. Such a course cannot be financially justified and is blatantly unfair.

I have seen instances where the bottlers provide non dispensing equipment to secure accounts. I know of several accounts that I lost that have total gross syrup sales of $200 per month or less where the Pepsi bottler placed ice makers at no charge with a value in excess of $1,000. Find me an accountant who could justify that free placement in terms of reasonable return on investment.

One of my customers recently told me that representatives of one of the bottlers said that they would provide whatever was necessary in equipment and transitional funds to secure the syrup business. We continue to serve that account because the bottler will not service the liquor equipment, coffee equipment, and orange equipment as our company does. There is historical precedent that prices rise when competition stops. When we lose the small independents, the checks and balances will be gone. Coke sets the pricing and Pepsi follows. If legislation is passed to allow us to compete fairly, the consumer will continue to benefit. If not he will pay a higher price.

The Coca Cola Enterprise (company owned) Bottlers have either pulled out of the syrup business or have dictated that all syrup operations operate profitably. The accountants in these companies came to the conclusion, and I believe it is a wise conclusion, that every operation in a company should generate a profit. We have been trying to tell them that for years. The

shift in attitude of Coca Cola Enterprises says something very significant about the unfair trade practices that have existed for many years and still exist, unfortunately, throughout the industry.

I am not here to suggest that Coke and Pepsi have conspired to drive the independents out of business, but I do suggest that the policies of equipment give aways have had the same net result as if there was indeed a conspiracy.

Sadly, it is too late for Congressional action to salvage my soft drink business. At the present time, I am struggling to save my business by diversifying into different areas such as juice concentrate manufacturing and related equipment placement. One definition of insanity is "doing the same thing over and over again expecting a different result." I will not continue to fight the Coca Cola and Pepsi equipment give away program under the present conditions. If Congress and the President will allow me to compete fairly, I will then have the option of re-entering the soft drink syrup and equipment business. If not, I will try to rebuild my business in another direction and hopefully survive.

As a closing thought, if it is the intention of this Congress to allow Coca Cola and Pepsi to totally control the soft drink business to the virtual exclusion of every other manufacturer then no action is necessary. If on the other hand, it is the intention of Congress to allow the small businessman and the entrepreneurial spirit to flourish, then enact legislation that will enable us to compete fairly and equally by prohibiting the giants from giving away equipment solely to enhance their control of the market. If you do the consumer will be the ultimate beneficiary.

Thank you.

Senator INOUYE. Do any of you have numbers to tell us how the small people were doing, say, 10 years ago, as compared to today? The numbers that we have, for example, suggest that two large companies control 85 percent of the business, and the rest of you 15 percent. What was it 10 years ago?

Mr. DAMON. I do not have the exact numbers myself. I know that Coca-Cola and Pepsi Cola did not control 85 percent at that time, if I am not mistaken.

Mr. IMBESI. Mr. Chairman, I would like to answer that. I can provide you with actual hard numbers. But a cursory look at the soft drink industry, 10 years ago, if you looked at the top-10 list, there are a number who have slipped dramatically on that list or are no longer on that list.

Cola segment has not increased dramatically. Ten years ago the cola segment of the soft drink business was approximately 65 percent. That is the sweetened cola. Now the sweetened cola industry has actually decreased.

However, when you look at the top-10 list, 10 years ago, Coca-Cola and Pepsi Cola, Coca-Cola had two brands in the top-10 list, and Pepsi Cola had two brands in the top-10 list.

Now, the top five brands are dominated by Coke and Pepsi. The other brands, the number three brand 10 years ago, which was Seven-Up, is now rated at number eight. The RC Cola, which was on the top-10 list 10 years ago, is no longer there. Diet Seven-Up is no longer on the top-10 list.

So while the cola companies have not necessarily increased their sugared-cola segment, they have increased their allied brands, mainly through their exclusion and their exclusionary practices.

Senator INOUYE. Mr. Damon, if this bill passed, from your experience, would you say that the cost to the consumer will rise?

Mr. DAMON. No, sir, I do not believe that it will. It will be stabilized, I would say. It will continue to be guarded with independent types as the vanguards of it.

Senator INOUYE. Are you aware of any other syrup manufacturer in your area other than Coke and Pepsi that loan or sell dispensing equipment at very reduced prices?

Mr. DAMON. No, sir. No, not as a general practice.

Senator INOUYE. If I may, I would like to also submit questions to you, Mr. Damon.

Now may I call on Mr. Jason.

STATEMENT OF BROOK R. JASON, PRESIDENT, JASON SODA SYSTEMS, INC.

Mr. JASON. Good morning, Senator Inouye. And thank you again for sponsoring S. 114.

I have submitted for the record my testimony. I would like to also address a few of the things that I heard earlier this morning.

Let me first give you some background into our business, which has its roots going back to 1945, where we started repairing soda fountains, long before their was a post-mix dispensing equipment business. Someone pumped a shot of syrup into a glass and added carbonated water from a draft arm, and stirred it up, and that was a post-mix drink.

Today, obviously, there has been an evolution of equipment design, and all of this is now done automatically.

I am a charter member of a trade association of people in the beverage dispensing equipment business. I can tell you from first-hand knowledge that our roles have changed dramatically as a function of those members who are no longer in the soft drink dispensing equipment business, but have had to go into other businesses to continue to stay profitable.

I am also a member of the National Soft Drink Association. I do not know if they are represented here this morning, but they have established that their policy on this bill is to oppose it.

I would like to call to your attention and submit for the record, that the board of the National Soft Drink Association is approximately 75 percent Coke and Pepsi bottlers. Therefore, I would not imagine that you would expect anything less than that from their board.

We developed our business from the 1940s on, by providing soft drink dispensing equipment to a customer at a reasonable rate of return for us. We have heard that it would be difficult to identify what that is or what fair market value is.

If you look at other leasing businesses of any type of equipment, whether it be a copy machine or a postage machine, most anyone who is renting equipment for a profit will try and get their investment back in a reasonable period of time, often approximately 18 months, and hopefully have a contract that will last three or four years, and use the balance of the contract for profitability.

The lease agreements that we see on the street by the soft drink manufacturers if in fact they are ever collected for, and this goes to the credit policy that is enumerated in the bill, would probably take somewhere between seven and 10 years to repay the investment. As a practical matter, based on the turnover in the restaurant industry, the average restaurant today is not surviving more than a year and a half.

Therefore, we do not feel it is reasonable that a seven year investment is a reasonable rate of return.

Additionally, our company is a wholesaler of fountain syrups. We are also a syrup manufacturer. I am proud to say, frankly, that we are a Coca-Cola fountain syrup wholesaler, and have been one since the late 1940s. Coca-Cola goes to market differently than Pepsi Cola in that, in addition to having bottlers distribute their product, they have also appointed independent wholesalers and grocery jobbers.

Pepsi Cola, predominantly goes to market through their bottling arm.

In addition, our company also has wholesaler arrangements with the Seven-Up Company, Dr. Pepper, Sunkist, and we have a line of our own products.

A number of years ago, Coke and Pepsi only had their flagship brands. Today both companies have a full brand set. Years ago, we could put in our own piece of dispensing equipment and offer the consumer who patronized a restaurant a full line of products dispensed on that equipment, and it was not uncommon to have our equipment dispensing Coke, Diet Coke, Seven-Up, Dr. Pepper, Sunkist, and maybe our own lemonade or something like that.

Today, with the loan programs from the syrup manufacturers, we are essentially locked out on those dispensers.

I am chairman of an industry relations committee for our trade association and, as recently as Monday, was advised by one of our members that, where the practice was in place by the Coca-Cola Company of allowing one valve to serve a generic product on their equipment, they are now changing their policy. If you want to serve a generic product, they are going to go back to the retailer and tell them that this low-cost equipment that they have is no longer low cost.

If that is not locking out the competition, I do not know what is.

Traditionally, we have only been able to approach the smaller-volume outlet. It is no secret that the large national chains have been served by Coke and Pepsi over the years. But we always had a niche for our own business.

Today, because the national chains have pretty much made their decisions on what products they want to dispense, I personally believe the only way that Coke and Pepsi can get at the smaller volume segment is to provide programs to the smaller-volume outlet.

Several years ago a Pepsi Cola bottler in our market, who over the years had not been in the post-mix business, frankly, because it was never profitable, certainly not as profitable as the can and bottle business and the pre-mix business, which is nothing more than cans and bottles in five-gallon tanks, was acquired by a West Coast conglomerate.

They made a decision that they wanted to make their mark in the post-mix business in southern New England. Together with the resources of the parent company of Pepsi Cola, it was widely known, put approximately 500 pieces of equipment in a warehouse and went up and down the street offering anything and everything to the retailer to get the business.

If it meant a dollar a week on a piece of dispensing equipment, that is what they signed for, where traditionally, we would get $10 or $12 a week.

One of the problems we had in trying to meet this competition was that we never knew what kind of deal they were going to approach a restaurant operator with. They could have two restaurants side by side with equal volume, being offered different deals, depending on who wanted to give away more for less. Frankly there is no way that any independent can compete with that kind of practice.

I am not sure that the intent of these practices is to eliminate the people in our business. As a practical matter however, that is what it has done, and that is what it continues to do. We have been financially sound enough over the years to compete with it, but I can tell you that we have not bought a piece of Coca-Cola trademarked equipment in over three years to place on rental because we cannot get our reasonable rate of return. As Mr. Damon has said, no banker in his right mind would loan money to place equipment like this for a rate of return that was seven to ten years down the road.

I am 2nd generation in my business with the third just begining. I am not sure, frankly, there is going to be a business for my family to continue in relative to the soft drink industry.

I have my family here in the room with me today, and they are obviously most interested.

Several years ago I was approached by a senior vice president of The Coca-Cola Company who in a nice way suggested that if I was wise, I would cash in my investment over the years and sell out to a bottling company because, in all probability, I would not be in business five years down the road. I should capitalize on what I had and not what I hoped to have five years later.

Several years ago I was intimidated by this suggestion and kind of dug my heels in and said I am not going to be intimidated. Today I am not so sure that he was not right; that in reality, we will not be able to survive much longer. We just cannot sell the other brands we have when Coke or Pepsi comes in with a full complement of products and offers pricing to our customers at a wholesale price through some grocery jobber who very often is supplying the product to the end user at close to the prices that we pay the manufacturer.

There are all kinds of price schemes on the market. I have seen many bottlers offer multiple price levels to a customer base where the price gets lower if volume is purchased. When push come to shove however, the lowest price is available whether you buy one tank or you buy 15 tanks.

If this practice is not stopped through legislation, I honestly believe that our business will not be in its present format several years from now, and I doubt very much that anybody else will be able to survive as well. Thank you.

[The statement and questions and answers follow:]

STATEMENT

OF

BROOK R. JASON

Mr. Chairman -- Good Morning!

My name is Bud Jason and I am the president of Jason Soda Systems, Inc. In 1945 my father Isy Jason whose parents owned a soda fountain in Bristol, Ct. had a problem finding a company to repair their soda fountain, created a company to install and service soda fountain equipment. Some of you may recall that soda fountains were common in drug stores in the 30's and 40's. Our industry's roots go back to the sale, installation and repair of soda dispensing equipment. When our family business was formed, the company name was Jason Carbonator Service because carbonators were the devices used to make the carbonated water from water and CO2 or carbonic gas. Today we are Jason Soda Systems, Inc.

In the early days of our business, carbonated water was dispensed from a draft arm and mixed with syrup from a syrup pump in the soda fountain rail. Many people can recall having a vanilla or cherry coke made by having the syrup and carbonated water stirred together. The development and use of this equipment gave birth to our industry.

CORPORATE HEADQUARTERS
145 EDWIN ROAD, SOUTH WINDSOR, CONNECTICUT 06074
(203) 289-7478 FAX (203) 528-1613

As technology progressed, equipment was developed to dispense a mixture of carbonated water and fountain syrups in an automatic way; hence the name fountain dispensing business used by several of the national syrup manufacturers. The mixing of carbonated water and syrup at the point of dispensing is called post-mix. This differs significantly from pre-mix which is nothing more than bottled or canned soda sold in bulk, normally 5-gallon containers.

Jason developed its business from providing carbonation systems and fountain syrups to restaurants, taverns, soda fountains and a variety of other food service concerns. Its revenue in the early years came from the renting of this type of equipment along with the supply of carbonic gas used to make the carbonated water. In our case, we also supplied the fountain syrups used in conjunction with the carbonation system. We are proud to say that we have been a Coca-Cola fountain syrup wholesaler since the late 40's. We also sell 7-Up, Sunkit Orange, Canada Dry products and a line of our own fountain syrups which we manufacture under our label.

Isy Jason established his business by renting equipment to restaurants who needed service for this type of equipment around the clock. In our marketplace our reputation has been based on our ability to provide service 7 days a week, 365 days a year. In today's difficult labor market in the New England area, this is no easy task. We are faced on a continual basis with rising costs of insurance (both liablity and health insurance) as well as ever increasing labor rates, vehicle costs, gasoline and many other ovehead expenses.

Having started the business from scratch with essentially no capital, the revenue was generated out of a reasonable return on the rental of equipment which a growth in capital in turn could be used to expand our accounts. For over 40 years, we have purchased and rented equipment to similar types of outlets throughout the New England marketplace.

I am saddened to tell you that in recent years it has been most difficult to rent equipment and sell fountain syrup at a reasonable mark-up because of policies and forces in the marketplace directly attributable to the two dominant cola manufacturers in the industry.

In the early years of our business, Coca-Cola USA, a division of The Coca-Cola Co., and Pepsi-Cola, while interested in the national restaurant chains around the country, were not active in the individual owner/operator restaurants that we have historically serviced. The programs offered by Coke & Pepsi have always been available to large national accounts. Such programs often include the placement of equipment on loan, marketing assistance as well as the payment of marketing funds for the sale of their products. In the late 40's when we began in the syrup distribution business, Coke & Pepsi had their flagship brands and no other allied products were manufactured. In recent years, Coke & Pepsi have developed and marketed a full line of products to meet the consumer's taste for the lemon & lime and other fruit flavors as well as diet beverages. With these added products they now wanted total control of the account.

As Coke & Pepsi's businesses grew in the national account market over the years, the business of our industry grew in the smaller account market. We took our cost of equipment, established a reasonable rate of return on the equipment, determined the cost to service that equipment, and established a rental rate structure that also allowed us to be competitive in the marketplace with our peers in similar businesses.

Our business grew dramatically over the years and until about 5 years ago, we projected planned growth from the placement of new accounts, additional rental income, carbonic gas sales and syrup sales.

Over the past few years however, we have been subjected to market pressures we feel we cannot overcome. We in our organization as well as hundreds of companies like us now find we are whipsawed by the dominant cola manufacturers in a manner that is unfair and anticompetitive. Allow me to explain.

Traditionally, we have gone to equipment manufacturers and purchased counter-top refrigerated dispensing equipment and other post-mix equipment at the most competitive prices we could secure and approached our customer base to lease, rent or purchase this equipment from us. Our rates historically have been established by repaying our investment in hardware and installation costs amortized over an 18 month period, and providing the customer with equipment service for the duration of the signed agreement. Now we find ourselves in the same marketplace, and have for several years, with the dominant cola manufacturers who provide the same equipment, often purchased at lower prices due to their large buying power. They do not rent, lease or sell equipment.

Rather they loan it or virtually give it to the same smaller volume customers we traditionally rented it to. Moreover, in their effort to compete for a larger market share relative to one another, we have found that they have lowered their syrup prices resulting in the smallest or lowest volume accounts being able to purchase syrup products at or below our wholesale cost.

To add insult to injury, these same two cola giants come to us and ask us to be their agent to install the equipment they have given to our former customers, service it, and provide the syrup for a small delivery fee. If we don't do it - "we'll get someone who will!" In many cases, they have approached our existing customers who were under contract with us, and induced them to break their contracts by offering equipment at little or no cost. Recently, we experienced a situation where a local Pepsi Cola bottling company was purchased by a large conglomerate which attempted to stake its claim in the marketplace by approaching almost every fountain type outlet in its franchised territory. They offered equipment at little or not cost ($1.00 per week) with national pricing on its syrup. One might ask how this can be done and for how long. Well, we have discovered over the years, and it has been readily admitted, that such activity is funded by the parent companies of both of the major cola manufacturers under the guise of marketing or advertising allowances. Pepsi Cola for example readily acknowledges subsidizing their bottlers to gain market share.

How do we compete with this?! Quite frankly, one of the few resources has been to pursue legal avenues directly against our customers by trying to enforce our agreements. Obviously this does not build goodwill in the

marketplace but our customers already believe at this point that we have been overpricing our product for years and frankly they could not care about their contact with us. One of the most blatent scenarios we see in the marketplace is a different "deal" being offered to each and every customer up and down the block in an effort to take the business away from the competition. While I truly believe that it is not the intent of either Coke or Pepsi to put companies like ours out of business, we are caught in the proverbial "squeeze play". We do not have the buying power nor do we have the "staying power" long term to meet this type of unfair competition.

Two years ago, we had two mechanics doing nothing but picking up our equipment around the countryside that had been disconnected and removed by Pepsi-Cola bottler I mentioned previously. Its interesting to note that our rental prices today, in an attempt to compete with Coke & Pepsi, are significantly lower than they were three years ago. As both Coke & Pepsi have expanded their free or loan programs to any and all accounts, we see no future expansion of our business in fact just survival may be very difficult. Unlike some of my contemporaries in the industry, we have been financially sound enough up to this point to sell our product based on the quality of our service even at a higher price and to overcome some of the objections of free or low priced equipment. Realistically however, we don't think we can continue much longer; it is difficult to compete when your competitor gives away the product you are trying to sell.

We have often said that we can compete with any of our peers in the marketplace who are buying equipment from the same sources and who have to work within the same labor market and endure the same overhead costs that we have in our marketplace. These practices must stop if we are to survive. Survival for

some of us, frankly has not been possible and some of my peers sitting in this room have all but been starved out of their businesses. Somer were lucky to cash out part of their investment by selling to a local Coke or Pepsi bottler.

Several years ago, I was approached by a senior vice president of one of the major syrup manufacturers with regard to selling my business. I told him it was a business I enjoyed, I was second generation and as with many family businesses hope my children will have the opportunity, if they have the desire, to follow me in this business. This executive suggested that my ideals were not realistic; that in fact, we in our businesses in the long run will probably not exist because the cola manufacturers are acquiring more and more independent bottling companies and will eventually acquire businesses like ours as well. He said, I should be content to get a fair price and sell out to a bottling company and pursue other interests. Quite obviously I was not intimidated by the picture he painted and told him I hoped I could continue to make my mark in this industry for some time to come.

As the cola wars escalate, I must say I sometimes question whether my ideals are realistic. We cannot compete with free equipment; we cannot compete with small margins on syrup and still cover our overhead. But the question I ask here today is why should we have to compete with these grossly unfair trade practices when everything they stand for is unjust! I often wonder, if the sales personnel of either of the major cola giants had to go out and truly sell relying on their own sales skills and the quality of their product, how many accounts would they have today. Both of these companies have grown in the fountain syrup business with the help of and at the expense of companies

like ours who have represented them well over the years. Now that we have helped to develop their business in a significant way, must we fall by the wayside? There is certainly something wrong with American business philosophy if two dominating giants can destroy an industry in their desire to become number one.

March 30, 1990

The Honorable Daniel K. Inouye
Committee on Commerce, Science and
Transportation
Room 227
Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Inouye:

Let me once again thank you for your sponsorship of S.114 and chairing the hearings of February 28, 1990. Please allow me to answer the questions in your letter of March 9, 1990. I apologize for the delay, your letter was received while I was away on business.

1Q. Did your buiness ever attempt to compete on a broad and national level, or have you always geared your services towards smaller markets?

1A. Our business was established in Hartford, Connecticut in 1945. Over a period of 45 years we have expanded our marketplace to include all of Connecticut, and the majority of Massachusetts and Rhode Island. Most of this expansion of territory came over the last 10 years, through acquisitions of smaller firms similar to our own. We have not had an acquisition in approximately 3 years, although there are a number of firms available for sale because they are no longer profitable.

2Q. You stated that the equipment supply business has been suffering in your area in recent years because of the influence of Coke and Pepsi's give-away programs. Can you point to any specific evidence to show exactly how these companies have affected the business in your area in the last several years?

2A. As enumerated in my testimony of February 28th, most dramatically we have seen Pepsi-Cola providing free equipment throughout the Connecticut marketplace where we traditionally have leased equipment to the small restaurant operators.

Lower Connecticut, specifically the Fairfield County Area, is adjacent to Pepsi-Cola World Headquarters. I have been advised by the owner of the Pepsi-Cola Bottling Company in that marketplace, that he has been instructed to do whatever is necessary to develop fountain accounts in his market for the purpose of increasing Pepsi's visibility. He has implied that marketing funds will be withheld from his operation if he fails to make gains in his market.

The impact on us has been the inability to lease equipment and sell syrup to those restaurants approached by Pepsi due to free equipment and wholesale "National Account" pricing on syrup with almost all their accounts. For example the National Account price for Pepsi-Cola products is below our wholesale cost from Coca-Cola and other nationally branded products, which we purchase directly from the various syrup manufacturers. These practices have also impacted us on a broad scale in eastern Massachusetts and northern Rhode Island where the Pepsi-Cola Bottling Companies are owned and operated by the parent company. The greater Boston area has traditionally been high visibility for Coca-Cola USA, however in recent years the Pepsi-Cola Bottling Company has placed equipment in accounts at no cost in order to gain market share.

Three and one half years ago, we acquired a business in eastern Massachusetts with every intention of renting soft drink dispensing equipment on a larger scale than we had done previously. However contrary to the testimony provided by the representative of NSDA, the CEO of the Pepsi-Cola Botttling Group of Milton, Mass., we have not placed any free equipment in that market. Frankly, in the last 4 years we have not been able to rent or sell any soft drink equipment as a direct result of the giveaway programs of Coke and Pepsi. The information provided by him at the hearings was totally erroneous. Our business in that market has essentially been reduced to delivering syrup to National Accounts under a Coca-Cola program where the account is billed directly from Coca-Cola USA for the syrup, and we are reimbursed for the cost of delivery only.

Our primary business in that eastern Massachusetts market has been the service of soft drink equipment for Coca-Cola USA owned equipment as opposed to our own equipment.

3Q. How have you been able to maintain your business and stay financially sound?

3A. Over the last 5 years as a result of the growing practices of low cost or loaned equipment, we have diversified our business to a broader line of beverage dispensing equipment. We are endeavoring to sell draft beer dispensing and liquor control equipment and enhance our mechanical service to national accounts in the various marketplaces that we cover.

Additionally, we have acquired a syrup manufacturer facility that was previously our supplier, so that we might manufacture generic products and be more competitive to our own accounts against Coke and Pepsi's national pricing.

4Q. Do your rental agreements with your customers in any way relate to the purchase of your syrup? Do most of your customers who lease or purchase your machines also purchase your syrup?

4A. Laws in Connecticut and Massachusetts do not allow our rental agreements to tie product sales to the use of the equipment. A copy of our agreement is enclosed for your review.

Over the years many of our customers have purchased our syrup in conjunction with the lease of the equipment. However, in the last 18 months many bottlers are producing syrup from concentrate giving them a lower cost then we have and consequently a distinct price advantage over us. They can sell to the food service outlet at a cheaper price but this lower price is not reflected in the price to the consumer for a soft drink. The foodservice outlet enjoys the extra profits.

5Q. Have you ever marketed your dispensing equipment in Coke's or Pepsi's free or reduced equipment programs? If so, what was the result? If not, would you consider it?

5A. Over the years we have tried to sell our equipment directly to Coke and Pepsi in an effort to enhance a "partnership" arrangement and maintain good relations. However, Coke and Pepsi both have established buying arrangements with the large equipment manufacturers who provide them equipment directly. Therefore we cannot be competitive in supplying equipment to either Coke or Pepsi.

We certainly would consider selling equipment to both Coke and Pepsi if we could be competitive.

6Q. Are you aware of any other equipment manufacturers that loan equipment for free or below cost besides Coke and Pepsi?

6A. I assume this question relates to other soft drink manufacturers and not equipment manufacturers. To my personal knowledge no other major soft drink manufacturers provide dispensing equipment at low cost or no cost to any foodservice outlet. These other soft drink manufacturers include Sunkist, Canada Dry, Dr. Pepper, Tetley Fountain products, and R.C. Cola.

Sincerely,

Brook R. Jason
President

BRJ:man
Enclosure

Senator INOUYE. How is the present condition affecting some of the better known small companies such as Seven-Up or Royal Crown or Dr. Pepper?

Mr. JASON. Well, I can tell you as a Seven-Up wholesaler that we have a difficult time selling brand Seven-Up through a piece of dispensing equipment that we provide because we need our rate of return on the rental. And while we can sell the product competitively, our rental rate is higher than what Coke or Pepsi would offer their equipment for if you give them all the valves and take their piece of equipment.

I find it interesting to note that they cannot afford to do it either if they do not get all the valves and want significantly more money for their piece of equipment if they have to give up some of those valves.

Senator INOUYE. Thank you very much, Mr. Jason.

Mr. Imbesi.

STATEMENT OF MARK A. IMBESI, GENERAL MANAGER, IMBESI BOTTLING GROUP, MID-ATLANTIC STATES

Mr. IMBESI. Good morning, Mr. Chairman. I am Mark Imbesi, the General Manager of the Food Service Division and one of the principal owners of the Imbesi Bottling Group, a Seven-Up/RC bottling company from the Middle Atlantic states. We have good service operations in Pennsylvania, New Jersey, Delaware, Maryland and Eastern Virginia.

I am testifying today in support of S. 114. I would like to speak to you about the current situation regarding equipment giveaways or, better put, the providing free of charge of dispensing equipment for the purpose of excluding competition engaged in by our competitors.

This practice which started several years ago is continuing to escalate despite claims by our competitors that they plan to charge rent and discontinue free equipment. The effects and injury to my business by this practice can be measured in lost business revenues, decreased franchise value, business opportunities lost, and immeasurable lost sampling opportunities of our products.

Some examples with respect to lost business revenue, one of the major customers lost due to this program was ARA, the largest vending and food service company in the United States. I was told by their vice president of purchasing that he likes Seven-Up personally and would like to continue using Seven-Up in his ARA locations. However, if he did, he would jeopardize his free equipment program and his support program.

This was in 1985. In the previous year of business through one location we did over $250,000 worth of business with ARA.

Another customer which was lost specifically as a result of a giveaway equipment giveaway program Gino's fast food chain based in Philadelphia, the Gino's chain ran over 200 fast food and family style restaurants which purchased Seven-Up syrups from our operations. Shortly before the chain was sold to Marriott, Coca-Cola provided free all new equipment to all locations. The end result was that our competitors became the exclusive soft drink purveyor in all locations.

Hyatt Hotels in Baltimore, Maryland, and Cherry Hill, New Jersey, were our accounts that were lost due to our competitors providing free all new equipment. In these accounts we were providing free equipment, but we lost them because of a new equipment national program. They did not wish to jeopardize their national program by staying with us.

Pargo's Restaurant and Saloon in the Baltimore area, growing restaurants whose base of operation is outside of our franchise territory. However, we were serving two of their locations in Baltimore. Again, we were providing equipment, but lost because Pargo's headquarters decided to do with the national free equipment program.

A chain of saloons based in the Philadelphia area was served by us for over ten years. Our competitors came in with a free equipment program and became the exclusive soft drink supplier.

Other major accounts that were lost due to these programs were Harrah's Hotel and Casino in Atlantic City, several independently owned Holiday Inns, corporately owned Holiday Inns, the Delaware Valley Buying Cooperative, a buying cooperative for diners and restaurants in the Delaware Valley, Wendy's franchise-owned restaurants, and corporately owned Po' Folks restaurants, just to name a few. The list could go on and on.

I have named major and recognizable accounts. However, our competitors with their free equipment programs have had even greater impact on the independent account side of our business. They do not have a program which we can compete with. They will give ice machines. They will give ice dispensers. We just simply cannot compete with it.

One of the most often heard comments from independent retailers is I would have to have Seven-Up, but this is not my equipment or they will not let me use anything but their products or if I use your product, I will be charged rent. I get it free now. These are lost opportunities for our brands.

In summation these programs have cost my companies over $2 million in lost annual revenues and decreased the value of my franchises by limiting the number of units sold. They have effectively locked our products out of certain markets and have diminished the sampling ability of my franchise brands. Thank you, and I urge you to enact S. 114.

[The questions and answers follow:]

SEVEN-UP BOTTLING COMPANY OF BRIDGETON, INC., #1 GLASS STREET, BRIDGETON, NEW JERSEY 08302 (609) 455-0756

March 20, 1990

Mr. Daniel K. Inouye
United States Senate
Committee on Commerce, Science,
and Transportation
Washington, DC 20510-6125

Dear Senator Inouye,

I would be glad to answer your questions. I am sorry to be slightly late but I did not receive them until March 19, 1990.

In answer to question number 1, We do have fountain syrup accounts which do serve Coke, Pepsi, 7Up and RC. We also have fountain accounts in an area of Central Pennsylvania were we are a Coke wholesaler. So therefore it is our equipment with Coke being dispensed and that Coke was sold by my organization.

In answer to question number 2, I will try to make my response as specific and brief as possible. Free equipment programs are detrimental to a franchised soft drink bottler. It is extremely difficult for a franchised bottler to provide free equipment in an age were equipment costs have sky rocketed and syrup prices have not kept pace with inflation.

To illustrate syrup prices over the last 10 years have increased between 2% to 3% per year. This is somewhat less than inflation. Equipment prices and technology have increased by approximately 150% in that same time frame.

The market leaders in soda drink business dictate the pricing of that industry. In their quest to grow market share Coke and Pepsi have kept syrup prices low and have chosen to give free equipment on a select and in my opinion haphazard manner. To specify haphazard it seems that my competition chooses as an equipment strategy a strategy of no strategy at all in giving out free equipment.

Being faced with these market conditions as a business man and a franchisee of national brands, I find it difficult to find justification to remain in the fountain business. However, the fountain business is extremely critical in maintaining the vitality and awareness of my franchised brands. Without the sampling of the fountain my franchised brands would quickly fade from the market place leaving only two huge alternatives.

In answer to question number 3, If S114 is passed the result immediately will be a greater competition for fountain beverages for retailers and restaurants. In almost all cases greater competition leads to lower prices.

In benefiting the general consumer this greater competition for the fountain will lead to a greater awareness of many soft drink brands and products. A greater awareness of many brands and products will again lead to greater availability and distribution which will lead to greater competition and greater competition generally leads to lower prices.

I hope I have answered these questions to your satisfaction. Again my apology for the tardiness.

Sincerely,

Mark Imbesi
General Manager Food Service

Senator INOUYE. When these practices have put you out of business in certain areas, do you find that the cost of the syrup has gone up?

Mr. IMBESI. Mr. Chairman, we have not totally gone out of business in a certain area. We are still competing in the area. We are just no longer competing in that chain. So we are still a force in the food service areas where we are. We are just pushed out of the specialty chains and buying cooperatives.

Senator INOUYE. And in no instance could you compete by providing free equipment, free ice machines?

Mr. IMBESI. There is a certain amount you can do with equipment. You cannot do the ridiculous.

An instance happened the other day. We had an account which did a very moderate volume of product, and our competition came in. We had a countertop dispenser which we were loaning to them. They would have done approximately four units a week. Our competition came in and provided them with an ice dispenser. The cost of a countertop unit is about $1,000 new, and the unit that was in there was about three years old. Our competition came in there with a piece of equipment that cost approximately $3,500.

I cannot compete with that. It does not make good business sense.

Senator INOUYE. It would make good business sense to take the free equipment, would it not?

Mr. IMBESI. It certainly would.

Senator INOUYE. Thank you very much, sir.

Mr. IMBESI. Thank you.

Senator INOUYE. Now may I call on Mr. Harris.

STATEMENT OF H. RONALD HARRIS, PRESIDENT, BETTER BEVERAGES/BAR MASTER

Mr. HARRIS. Thank you, mr. Chairman. My name is Ron Harris. I own and operate Better Beverages, Incorporated of Cerritos, California, which is just outside of Los Angeles. My company sells, leases, installs and services beverage dispensing equipment for the fountain market. Our customers are restaurants, bars, taverns, fast food establishments, schools and hospitals.

I have been continuously involved in this business for over 25 years, and I am here today to testify in favor of S. 114. As it was already discussed, most loan equipment giveaway programs in the beginning are for high volume fast food outlets, schools, stadiums and Coke and Pepsi disguised these giveaway equipments as marketing allowances or promotional opportunities. Clearly, however, their purpose has been to control the fountain market, and they have since expanded these programs to encompass practically every type of fountain outlet down to the smallest account.

For example, when Coca-Cola furnishes the dispensing equipment, they control the soft drinks dispensed from that equipment. As an example, again, omitting Seven-Up, Sunkist, Hires Root Beer to name a few brands that are diminishing in the marketplace.

Because Coca-Cola manufactures a family of soft drinks, they effectively exclude independent sellers of dispensing equipment and

other manufacturers of soft drink syrups from selling to those retailers who have received this free equipment or loaned equipment.

Recently we have seen both Coke and Pepsi try to increase their market share by buying Dr. Pepper and Seven-Up. Fortunately for the consumer, the Federal Trade Commission fought these acquisitions and in its complaint against Coca-Cola the Commission charged that the acquisition of Dr. Pepper would "significantly lessen competition in the market by increasing the likelihood of collusion and by making it more difficult for new firms to enter the market and more costly for current firms to compete."

The Commission alleged that these factors would likely lead to increased prices and restricted output of carbonated drinks, contrary to what we heard here earlier this morning by the FTC. If it is anti-competitive for these companies to buy their competitors, I ask you how can they be allowed to run the beverage dispensing industry out of business by placing equipment in restaurants and taverns at little or no cost.

Those of us appearing here today cannot compete against this practice, as you have heard time and time again. We do not hold a candle to the vast capital resources of either of these giant companies. Does competition mean two companies competing against each other and only two companies? I ask you that.

Today because of programs like these Coke and Pepsi control 85 percent of the fountain soft drinks being sold. Earlier we were asked what the percentage of the market was years ago. I believe the marketplace approximately 20 years ago was controlled by approximately 60 to 65 percent of the parent companies, so they have gained significant control over the market in the last two years. Caught in the middle of the cola wars, of course, are the small businesses that collectively employ thousands of people whose livelihoods depend on their being able to sell and service beverage dispensing equipment.

The immediate impact on the consumer is readily seen by the absence of soft drink brands in restaurants and bars. Ask yourself, have you ever had a choice between Coke and Pepsi, RC or any other cola in a fast food restaurant? How can any of us say that the consumer has a choice if the industry is reduced, for all intents and purposes, to just two companies and those two only offer the consumer a choice of three or four flavors.

I would like to add rebuttal to some of the testimony given at previous hearings by some of our opponents. A Mr. Al Griggs testified that the NSDA opposed S. 114. I ask whether or not they actually polled their membership to vote for or against this issue. They claim to have a membership of around 650 members.

Secondly, if this decision to oppose S. 114 was a board decision, did Mr. Griggs inform us that the board of directors for the NSDA is comprised of over 75 percent of Coke and Pepsi-controlled companies? That while he would like us to believe he speaks on behalf of its membership, his testimony was only a description of what his company does is New England, and a single relatively new program that his company is offering to his customers.

Most of the testimony you are hearing today here are things that have transpired over quite a few years. The position we are in today did not happen in just a few days or a few years. We have

been complaining as the Federal Trade Commission alluded to earlier that they have had complaints for years.

We have tried to discuss this with the Federal Trade Commission, and they said it was a low priority. We, in examining the existing laws on the books, if we had to go the route that they tried to say that is available to us, we would be bankrupt trying to put ourselves in compliance or to have those laws work for us. There is just no way small companies like us have access to the vast funds that would be required to do that kind of litigation.

In its programs Mr. Griggs did not discuss Pepsi programs or RC programs, Seven-Up or any other brand as a representative of the NSDA. Examples of other brands are Double Cola, Nehi, Canada Dry, Orange Crush, Schweppes, Sunkist. I could go on and on about other brands that are available "in cans and bottles in your grocery store" but are not available in the fountain market.

There is a distinct difference between the can, the bottle and can market and the fountain beverage market. I could certain go on and name other brands hardly any of which can be found on a fountain in local restaurants.

Mr. Griggs testified that 85 percent of all loaned equipment is installed in accounts which buy 1,500 gallons of syrup per year or less. Let me say that represents as much as 50 percent of all the outlets in this country, and they, quote, Coke and Pepsi, will not be happy until they clearly have 100 percent of the market to themselves.

The proponents of S. 114 are not opposed to bona fide advertising and promotional programs. Our concern stems from tied arrangements where a retail account accepts free equipment resulting in a contractual or implied obligation to buy only one brand of products.

We are not suggesting or seeking an opportunity to market a different brand of cola. Rather, we are seeking the elimination of inducements which in turn eliminate the consumer's right to choose among soft drinks, inducements or obligations which exclude and eliminate competition.

And another argument raised by the National Restaurant Association was that by denying free equipment, the retailers would suffer higher costs and possibly raise prices to the consumer. I would like to say that fountain soft drinks are without a doubt the most profitable products sold in a restaurant today.

The NRA stated that seven out of ten eating establishments have gross sales of less than $500,000 annually and that these restaurants would be hard hit by lack of free equipment. I think nothing could be further from the truth.

Restaurants of this caliber could, in effect, lease or buy equipment. They are leasing equipment for around $600 per year or even less including full service and maintenance. Profits from a single five-gallon container of syrup are approximately $275 to the restaurant. Even the smallest restaurant uses approximately 300 gallons of syrup per year. This relates to about a $16,500 profit in the smallest of restaurants alone. If they could not afford a $600 bill, they are in deeper trouble than we think.

Another argument to this is the inflated cost of Coke and Pepsi pricing. The manufacturing in relationship to the manufacturing

costs of a gallon of syrup. Those of us who are in the manufacturing end of the business can relate that the actual cost of a gallon of syrup excluding the national name brands or using a generic brand would cost about $1.50 per gallon to produce. Yet, the wholesale cost to distributors, those of us who are wholesale distributors like Mr. Jason and myself, we pay approximately $5 or more for a gallon of national name brand product. And the retail price to a restaurant in many cases is $6 or less.

I have with me a pricing structure and information that will substantiate that that I would like to submit for evidence, please.

Senator INOUYE. That will be made a part of the record by reference.

Mr. HARRIS. This pricing structure is not mine, but it is my local Coca-Cola bottler, one of my competitors. That Coca-Cola bottler happens to be owned by Coca-Cola Enterprises, which in turn over 40 percent is owned by the parent company, Coca-Cola.

I want to ask you, who is actually supporting and paying for the free equipment? Based on these prices, the wholesaler in many cases is paying for the cost of the equipment. Again, with profit margins like this, to suggest banning free equipment would cause retailers to be hard hit is not borne out under close analysis. The price of syrup, in fact, could drop considerably if free equipment was not available.

The consumer is paying for this equipment but as yet is not being afforded the opportunity to have a choice of products as they do when they go to the grocery store and there is a large variety of products available.

In conclusion, let me say S. 114 is neither unique nor anticompetitive. In fact, it will enhance competition in a market that is rapidly becoming the exclusive domain of only two companies. The practices that S. 114 will eliminate Congress found objectionable with respect to alcoholic beverages in 1935 when it enacted the Federal Alcoholic Administration Act.

As earlier stated by our counsel, Wisconsin has enacted legislation which prohibits the giving away or loaning of soft drink equipment. California law for many years now has made it unfair trade practice for the dairy industry to do the same thing, to end up monopolizing dairy products in a marketplace.

I am sure that we will all agree that the beer and alcohol industries are very competitive. I am sure we all saw Super Bowl and saw the Bud Bowl, and we see Miller Lite, Miller beer, Stroh's and all these other products available for sale. They have been excluded from giving away free equipment, and I believe there is no lack of competition in that marketplace. It certainly would not be to the benefit of the consumer to have available only two brands to choose from.

Among us today are people in our industry. When I say "our industry", the independent part of the industry, from all over the country. Aside from myself being from California and Doug being from Reno, Nevada, we have people from Illinois, a family that has three generations in the business also.

One of our competitors who unfortunately is not here is in bankruptcy and has to a certain extent been forced out of the California

market and is being reduced in the Chicago market for a lot of reasons from the competition that he has faced.

We have a lady here from New York who recently, I understand, lost a large contract she has had for many years with a supplier, one of the largest food purveyors in the City of New York, where Coca-Cola came in and gave away free equipment and put her out of an account that she has had for an untold number of years.

The stories go on and on, and I am sure we do not have time for them. Unless we do something, as has well been said, to stop this, I think many of us will be looking for another form of employment or to diversify our efforts into something else or just sell out and take what we can get as we can.

Senator, thank you very much for your time in introducing our bill again.

Senator INOUYE. Thank you, sir.

I gather that you do lease or rent equipment?

Mr. HARRIS. Yes, sir. Our primary livelihood is dependent upon that. In the last couple of years our rental income has decreased by over $100,000 per year.

Senator INOUYE. Do you lease it out for a dollar a month or something like that?

Mr. HARRIS. No, sir. I am in business to make a profit, and a fair evaluation of a profit in my books, if you wanted to audit me here and now like everybody else in the IRS, I would probably make around 4 or 5 percent. When it comes to the bottom line in my business it is not a great return on your investment, but we employ in my company about 75 people, and I am happy with the business. I will not be able to survive if my profit drops much lower, that is for sure.

Senator INOUYE. When you lease your equipment, do you also require that the lessee use a specific product of syrup?

Mr. HARRIS. The only stipulation we make to product is that it is a quality product. The reason we use "quality product" is we feel there are some substandard products on the market that could be dispensed through a dispenser that would not give the quality drink that the consumer would like, as well as there are some products on the market that are just literally not manufactured to go through dispensing equipment and, therefore, could cause harm to the equipment, thereby causing us to make unnecessary repairs to said equipment and necessitating a chargeback to the customer.

Most of the products that are dispensed through our equipment that we lease out in the Los Angeles market—and when I say Los Angeles I virtually mean the L.A., Orange County, Riverside and San Bernardino areas—are Coke products, RC Cola products, 7-Up products, our own brand of generic line name brand products.

There is just a large variety of products that go through them. We do not restrict it to anything other than quality.

Senator INOUYE. All right. Thank you very much, Mr. Harris.

Gentlemen, I thank you all.

Our next panel consists of the following: The President of Pepsi Cola Bottling Company of Milton, Massachusetts, Mr. John Webster, speaking on behalf of the National Soft Drink Association, accompanied by Mr. Eugene Meigher, counsel; the Senior Director of Government Affairs of the National Restaurant Association, Mr.

Mark Gorman; the President of Multi-Flow Dispensers, Mr. Bernard Gottlieb; and the Vice President of Fountain Division, Dr. Pepper/7-Up, Mr. Richard Wach.

Mr. Webster, welcome, sir.

STATEMENT OF JOHN WEBSTER, PRESIDENT, PEPSI COLA BOTTLING COMPANY, ON BEHALF OF THE NATIONAL SOFT DRINK ASSOCIATION; ACCOMPANIED BY EUGENE MEIGHER, COUNSEL

Mr. WEBSTER. Thank you. My name is John Webster. I am Executive Vice President and Chief Operating Officer of the Pepsi Cola Bottling Company of Milton, Massachusetts. We are an independent bottling company doing business for over 100 years. In fact, we started in 1985. Lightning hit our barn, and we got out of the cow business and went into the bottling business.

I am also a member in good standing of the National Soft Drink Association, NSDA, the organization representing the soft drink industry, on whose behalf I appear here today.

Accompanying me today is Mr. Eugene Meigher, whose law firm is the Association's antitrust counsel.

We appreciate this opportunity to appear before you today to discuss S. 114. I should add NSDA testified before the same subcommittee in September of 1988 in opposition to an identical version of S. 114. NSDA's position on this legislation remains unchanged and has since been reaffirmed by the NSDA board of directors.

Our testimony consists of two parts. I will give a brief summary on how the fountain business operates within the soft drink industry, and Mr. Meigher will offer more specific details on our opposition to S. 114.

Competition of fountain-dispensed beverages, as it is in the package side of the business, is and has always been and continues to be fiercely competitive. The big winners are consumers and retailers. It remains to be a very procompetitive practice.

In the 1950s in an attempt to gain distribution in fountain sales, Pepsi Cola needed to create a point of difference with other manufacturers. It created and loaned to retailers a dispensing pump which played the Pepsi jingle after it dispensed 12 ounces. It was a big hit with most small retailers for two reasons: it was different; and it offered consumers entertainment. More importantly, it offered twice as much soda for the same price. I will not perform the jingle for you, but I hope you recall it.

What began to emerge in succeeding years is what we see today as essentially frequent buying programs. Buying one's products or services entitles you to certain other privileges. By buying soda from a particular manufacturer, you got other benefits like a clock for your wall, an attractive menu board for customers to read, or equipment to dispense soda and, in some instances, actual dollar rebates based on, for example, gallons sold.

Our experience today is that smaller independent outlets and local chains will often prefer loaned equipment and merchandising items if they can be negotiated, while larger national chains prefer dollar rebates. Today, approximately 35 percent of all equipment is loaned. Of the loaned equipment, 85 percent is installed in ac-

counts which buy, according to our estimates, less than 1,500 gallons of syrup per year. This is considered a small outlet.

To give you an additional perspective, a single Burger King restaurant which owns its equipment does an average of approximately 3,000 gallons per year. So as you can see, our average customer is quite small. These businesses are small and usually undercapitalized. After paying rent and food costs, there may be very little left for equipment like soft drink dispensers.

When you consider most dispenser units, because of advance in technology, the increased number of dispensing heads can cost anywhere from $2,500 to $3,000. Avoiding a portion of these costs represents a major savings to a small business.

Do I make money by lending equipment? Yes, but only if it is a good customer who will continue to do business with me over an extended period of time. Clearly, my profit margin is smaller on such accounts.

Mr. Chairman, we are not here today because consumers are paying inflated prices for soft drink beverages at retail food outlets. Soft drinks remain a great bargain.

We are not here because retailers are paying inflated prices for dispensing equipment. Those who can negotiate loaned equipment arrangements with their beverage suppliers are doing a service for their customers.

We are here for one reason and one reason only. A few people want to use the government and public policy to guarantee them a market. The fact is, the market is available to them if they choose to compete.

In our market, I compete against at least 11 Coca-Cola syrup suppliers alone plus another half dozen other syrup suppliers. With so many syrup suppliers, some retailers have several options from which to choose, including getting advertising support, merchandising materials, equipment placement and service arrangements. Such arrangements may vary by outlet. In fact, one of my largest competitors is Jason Soda Systems, whose fountain business is much larger than mine. Jason uses the loaned equipment program to compete against me. I am having a hard time understanding why Jason feels he is being treated unfairly when he is a major Coca-Cola syrup supplier in my area.

The major Coca-Cola bottler, Coca-Cola Enterprise, has reduced its syrup sales and marketing activity significantly, thereby allowing Jason to expand his business as a result.

One of my customers is the United States Naval Air Station in South Weymouth, Massachusetts. It uses my equipment. In fact, I was asked to specify loan equipment in my bid to the Navy. If I continue to be competitive in price, offer quality Pepsi products, and do a good job of service, I would like to think they will be a long-term customer, in which case I will be happy to continue underwriting a portion of the equipment. The same applies to other customers like hospitals and small mom and pop outlets.

Subsidizing purchases of equipment used to serve or display a product, whether it is finished beverages in a restaurant or a shoe rack in a shoe store is a longstanding business practice and is used in many consumer and industrial product situations where specialized equipment is required. It helps to meet our customer needs,

enhances the value of products to consumers, and protects our goodwill image. It is a cost efficient direct approach, self-regulated and governed by the competitive free market.

If all retailers are forced to lease or purchase fountain equipment on their own without the support of the soft drink manufacturer, they may select the wrong equipment, and the consumer pays the price for the mistake.

Soft drink companies have invested millions of dollars in equipment, research and development, quality control programs and training for service agents, many of whom are on call 24 hours a day. In fact, the ability to provide fast, reliable dispensing equipment has become a major competitive battlefield in the soft drink industry where retailers and customers are beneficiaries.

Mr. Chairman, S. 114 is misguided and unacceptable legislation. This legislation would severely hamper free competition of the soft drink syrup sales. It would be unwarranted intrusion into ordinary marketing practices that are lawful. It would lead to poorer quality beverages at higher prices to consumers.

For these reasons, the National Soft Drink Association opposes S. 114 and encourages the committee to reject this premise and view it for what it is, a narrow, special interest idea which will benefit only a few.

Mr. Chairman, Mr. Meigher will now present specific comments on S. 114 with special focus on legal redress under current law.

Mr. MEIGHER. Senator Inouye, since I have submitted written testimony I will summarize my testimony.

Senator INOUYE. Fine.

Mr. MEIGHER. There are a number of reasons why NSDA opposes the bill. The first of our reasons is that we feel that the current antitrust laws are more than adequate to deal with any problems that may come up in connection with the industry. Since that is something that the FTC representatives talked about at length, I am not going to dwell on that, although I would be happy to comment on recent cases in the industry or enforcement posture at either of the two agencies if that is of interest.

I think it is very important to focus on the very different thrust of this bill and its inconsistency with the antitrust laws because it really does have implications for the way that this bill would act and how it would work out in this industry if enacted.

While there are a number of different antitrust laws and they have different purposes, there is a common thread that runs through them. They all focus and they all have basic tests which are tests of what are the effects of the transactions in question upon the competitive process. They do this in a variety of ways, but it always comes down to that.

The question is, on balance will this transaction or will this series of transactions inhibit competition, or will it benefit competition? Sometimes there are tradeoffs, and it is basically a balancing test that goes on. This is what antitrust means by the rule of reason.

So the thrust of all these statutes is a consistent focus upon competitive effects of practices. In that sense, this bill is radically different because when one looks at the bill for a competitive test, for a test that says what is the trigger that causes the violation in

terms of effects in the marketplace, one does not really find it. What one finds instead is something that sounds a little bit like competition but really is not. What one finds in the bill is a focus upon competitors.

For more than 50 years, the Federal courts in enforcing the antitrust laws have consistently made the point that what antitrust is about is protecting the competitive process, not protecting competitors. It may happen that in the process of protecting the competitive process, competitors will be protected, but that is not the prime purpose of antitrust.

Now the bill as it is structured frequently uses the word "transaction" at points where a real antitrust bill would be talking about either competitive effects or the competitive process.

For example, in subsection (a)(2) where there is a phrase "substantially to restrain or prevent transactions", the bill is an open invitation to look to some competitors' loss of a particular piece of business and to trigger the whole bill into effect. That is not the way antitrust typically works. You may look at individual transactions to determine whether competition generally in a marketplace is going to be hurt or not, but you do not create a violation by simply demonstrating that somebody has lost business to somebody else.

I think that certain of the passages of this bill come perilously close to that because they talk about instances where a person persuades a retailer to give business where the effect is to exclude another supplier or to hinder another supplier from dealing with that retailer.

The fact of life is that for many of these retail establishments, it is an either/or proposition. The retailer does not want wall-to-wall dispensing equipment. He wants one set of dispensing equipment, and the focus of competition in this market is those points in time when the retailer reconsiders whether he wants this supplier or that supplier.

When he picks one of those suppliers, at least for a period of time everybody else is going to be excluded. I am afraid that that exclusionary effect is caught by the bill. I think that may not be intended, but it would be an unfortunate implication of the bill.

There is another way in which there is a very serious departure in this bill from traditional antitrust, and that is that when you look at the statutes, what you find is that they basically describe violations in terms of effects. They do not go to specific practices and say this practice is always bad.

Even the Clayton Act, which is the most specific of the statutes and which does name things, for example, they identify exclusive dealing, does not flatly condemn exclusive dealing.

Rather, it talks in terms of exclusive dealing will be a violation when the effect of the exclusive dealing is substantially to lessen competition in a market. So there is an invitation to look at the relevant market, an invitation to examine what the effects of the practice will be in the market, but I think you look in vain in the antitrust laws for a blanket condemnation of practices and that, in effect, is what happens in this bill.

The section B talks about a series of practices and treats them virtually as if they were per se violations, and I think as one looks

at the body of historic antitrust law now and then one finds these various practices examined by courts and, in most instances, found by courts to be normal competitive practices, another variation of price competition, although they may be abused in a given circumstance.

So, I think we are well served by the traditional antitrust approach which is to look at the practice in question, examine what its effects are, and then make a decision about whether there is something pernicious about the practice or not.

Lastly, the association opposes the bill because of some of the standards in the bill which we think are ambiguous and which would probably not work out in the way that may have been intended by its proponents.

There was mentioned earlier today about the phrase "fair market value." Fair market value is a concept whose content nobody knows. The notion of fair pricing has come up now and then in antitrust, and it is a code word usually for being fair to your competitor. It is a way of reducing price competition. It is an invitation to go a little bit easy on competition and let prices drift upwards.

There is also a phrase in b(3) about the credit period that is usual and customary in the industry. I am not sure if anybody will ever know what that is, but the search by a competitor or local competitor to determine what that is could very well get him indicted in most circumstances.

There have been antitrust cases where competitors, local competitors, have agreed one way or the other about credit terms, and the effect of this provision is to warn somebody who wants to be competitive who may even want to be aggressive that he had better check to make sure that he does not get too far ahead of his competitor. Well, that is an invitation to pick up the phone and find out what the prevailing credit terms in the market are, and that would be a very unfortunate step for a competitor to take.

That is the summary of our comments.

[The statement and questions and answers follow:]

Testimony of Eugene J. Meigher

On Behalf of National Soft Drink Association

My name is Eugene J. Meigher. I am a partner in the law firm of Arent, Fox, Kintner, Plotkin & Kahn. My firm serves as antitrust counsel to the association and I appear before the subcommittee today in that capacity. I appreciate this opportunity to present the subcommittee with NSDA's specific comments on S.114, which would amend Section 5 of the Federal Trade Commission Act. I would like to add that this is not the first time that NSDA has commented on this legislation. Mr. Chairman, I would like to note that I appeared before this subcommittee on behalf of NSDA on September 18, 1988 to testify on legislation very similar to S.114.

NSDA is strongly opposed to S.114. The bill is basically antithetic to the spirit of the antitrust laws. Existing antitrust laws are fully adequate to halt any equipment leasing practice that restrains competition. However, the purpose of the bill is to reduce competition, not increase it. Finally, S.114 is unclear. It is confusing and ambiguous, and it would inhibit competition in the supply of fountain equipment in a variety of ways. By potentially prohibiting any form of marketing support from soft drink manufacturers to soft drink retailers, the bill casts a large burden on competition. In a letter to the Consumer Subcommittee of the Senate Committee on Commerce, Science and

Transportation, then Chairman Daniel Oliver, of the Federal Trade Commission, reached similar conclusions.1/

1. S.114 is unnecessary.

Implicit in the proposal to adopt S.114 is the view that existing antitrust laws are somehow inadequate to deal with any anticompetitive situations that may arise in connection with the distribution of post-mix soft drink dispensing equipment. On the contrary, existing antitrust laws are fully adequate to deal with any practices in the marketing of post-mix syrup that would impair competition.

The core concern of S.114 seems to be that loaning or leasing soft drink equipment at less than "fair market value" -- however that should be measured -- is harmful. But if loaning or leasing below cost is harmful to competition, it is already illegal, both under the Robinson-Patman Act and under the Sherman Act. Power Replacements Corp. v. Air Preheater Co., Inc., 356 F. Supp. 872, 889, 897 (E.D. Pa. 1973).

Similarly, if the bill's concern is the use of free or low-cost equipment to restrict competition in the sale of soft drink syrup, that practice can be attacked under either Section 3 of the Clayton Act or Section 1 of the Sherman Act,

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1/ Letter to the Honorable Ernest F. Hollings, Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation from Daniel Oliver, Chairman, Federal Trade Commission, November 17, 1988.

whenever it harms competition. E.g., Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618 (10th Cir. 1965), cert. denied, 383 U.S. 945 (1966).

Secondly, it is difficult to perceive how "giving away" fountain equipment might threaten or result in a monopoly in any line of business, but if that practice created such a threat, Section 2 of the Sherman Act is available. Any practice that is "predatory" -- that is, it restricts competition without justification -- is illegal under Section 2 if it is designed to obtain, or maintain, a monopoly. Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977) cert. denied, 493 U.S. 829 (1978).

Third, any unfair method of competition is prohibited by Section 5 of the FTC Act and by the numerous "Baby FTC Acts" in the states. E.g., Wisconsin Statutes, 100.30(3).

Finally, there are a variety of state and common law remedies that deal generally with unfair competition and unfair business practices. None of the statutes have thus far adopted the position that the practices that are the subject of the proposed legislation offend their unfair competition statutes.

For all of the foregoing reasons, we believe that existing antitrust laws are adequate to deal with anticompetitive conduct that might arise in connection with the marketing of post-mix syrup and equipment. No need has

been established for the passage of special legislation. Certainly no need has been established to pass legislation that is repugnant to basic antitrust principles.

2. S.114 would harm competition

S.114 departs from traditional antitrust standards in a radical way. The guiding principle of all the antitrust statutes is to preserve competition. Section 1 of the Sherman Act prohibits agreements in unreasonable restraint of trade. The substantive provisions of the Clayton Act forbid various practices that "substantially lessen competition." Section 5 of the Federal Trade Commission Act broadly declares unlawful unfair methods of competition in or affecting commerce.

In contrast, S.114 focuses on protecting competitors rather than competition. In fact, S.114 may be violated with no impairment of competition at all. A violation is possible even if no competitor is significantly injured. For example, the "injury" aspect of the bill is satisfied if any competitor is "hindered" from selling syrup to a single retailer. This test is not only different than that incorporated in the Sherman and FTC Acts, but also antagonistic to the spirit of those Acts.

A long line of court decisions, stretching back over sixty years, has held that the loan of equipment for use with an associated product is perfectly reasonable and pro-competitive. In 1923, the Supreme Court upheld the practice

of gasoline refiners leasing gasoline pumps at nominal rates to retailers provided that the pumps be used with the refiners' gasolines. FTC v. Sinclair Ref. Co., 261 U.S. 463 (1921). In 1962 the FTC found nothing improper in ice cream manufacturers loaning freezer cabinets to food stores for use only with the manufacturers' ice creams. Carnation Co., 60 F.T.C. 1274 (1962). In 1965 the Tenth Circuit Court of Appeals rejected antitrust attacks on a grocery wholesaler who loaned display racks to retail grocers, but required the grocers to use the wholesaler's goods on those racks. Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618 (10th Cir. 1965), cert. denied, 383 U.S. 945 (1966).

The courts have twice upheld loaned equipment programs in the soft drink industry. Sulmeyer v. Coca-Cola Co., 515 F.2d 835, 847 (5th Cir. 1975), cert. denied, 424 U.S. 934 (1976); Bayou Bottling Co. v. Dr. Pepper Co., 725 F.2d 300, 304 (5th Cir. 1984), cert. denied, 469 U.S. 833 (1984). In the Bayou Bottling case, the court stated that providing free coolers and free service to retailers was "not barred by the antitrust laws. [These practices] are competitive acts."

None of these decisions can be attacked as aberrational or novel. Instead, these decisions are consistent, long established, bedrock antitrust law. Thirty years ago, Professor Donald Turner, one of the leading mainstream antitrust commentators, wrote that the lease of a

promotional product or collateral service at low or no cost along with another product was not an illegal practice but was merely a form of non-price competition. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 65 (1958).

There is no basis for reversing course now.

3. S.114 Is Unclear

S.114 contains a number of expressions that are not defined and that may create unfortunate results in the enforcement of the bill. I will mention just a few examples. The expression, "substantially to restrain or prevent transactions," in subpart (a)(2), is nowhere defined, but it arguably applies even to the situation where a retailer has extracted such a good deal from one supplier that the retailer wants to deal exclusively with that supplier.

Similarly, the bill comes into play whenever there is an effect "to prevent, deter, hinder or restrict other persons from selling . . . to such retailer." However, none of those terms are defined. If there is no exclusionary agreement between the retailer and its suppliers, does the unwillingness of the retailer to deal with a competing supplier "hinder" that supplier within the meaning of this bill? Or if the retailer wanted no more than one piece of dispensing equipment, would that "hinder" the other person's sales? It is not uncommon for retailers to choose to have only one brand of dispensing equipment in their outlets. One

does not have to fall back on concepts of conspiracy or monopolization to understand why retailers might make such a choice. If such a retailer's decision "hinders" a potential supplier, then the actual supplier -- simply by furnishing any of the services described in (b) -- puts itself in peril of a violation. And the violation may be found without any finding of a lessening of competition.

Subsection (b) describes certain practices as "means of inducement," which are components of the violation created by the bill. Such practices, however, have often been reviewed by the courts, and that judicial experience does not support the presumptions created by S.114 against the practices. On the contrary, the offer of free goods and services is frequently a form of competitive rivalry. Competition would not necessarily be strengthened by mandating that it take only one form -- price competition. Just as public policy does not favor suppressing such forms of competition in other industries, there is no basis for suppressing such competitive initiatives in the soft drink industry.

Subpart (b) is replete with ambiguous language whose most likely effect will be to dampen competition in the market. The phrase "below fair market value" is hopelessly ambiguous and nowhere defined. The bill does not make it clear whether the "market," referred to, is a local market, a regional market or a national market. Moreover, the concept

of "fair market value" implies "me-too" pricing, since it evidently departs from antitrust concepts like below-cost pricing. Similarly, encouraging a limitation of credit to a period that is "usual and customary" is an invitation for competitors to go along with the least competitive suppliers in the market. The likely effect of S.114 is to eliminate the offer of credit terms as an element of competition. If competitors were to agree to refrain from offering credit beyond a certain term, they would be indicted. The bill achieves the same effect.

S.114 would also bar soft drink companies from providing signs, money, or services of any kind to retailers. Thus, all cooperative advertising and all joint promotions and marketing efforts involving soft drinks would be effectively prohibited.

For all of these reasons, NSDA urges that S.114 be defeated.

nsda

April 17, 1990

The Honorable Daniel K. Inouye
United States Senate
Committee on Commerce, Science
and Transportation
508 Dirksen Senate Office Building
Washington, D.C. 20510-8125

Dear Senator Inouye:

This letter is in response to your letter of March 9, 1990, to Mr. John Webster, Pepsi-Cola Bottling Company of Milton, Massachusetts, forwarding questions of Committee Members on S. 114, a bill to declare certain activities of manufacturers of soft drinks to be unfair acts or practices for purposes of the Federal Trade Commission Act. In the response we have set out the question first and then our answer.

QUESTION 1: Did the NSDA poll its members before arriving at a position on S. 114, or was it a Board of Director's decision?

ANSWER: NSDA'S position on S. 114 is a Board of Directors decision. The NSDA Board approved the policy position on S. 114 at its meeting on April 10, 1989.

Article IV, Section II, of the NSDA Bylaws authorizes the Board of Directors to carry out the objects and purposes of the Association. Included in the duties of Board members is the consideration of pending legislation in the United States Congress that will affect the interests of soft drink industry members and adoption of appropriate policy positions in response to such legislation. The NSDA Board's policy decisions are not made as the result of formal polling of its more than 800 members on each item that the Board addresses.

QUESTION 2: What percentage of the NSDA's Board of Directors is made up of Coke or Pepsi representatives?

ANSWER: The NSDA Board currently consists of 20 voting members, an elected Chairman (non-voting), two immediate past Chairmen (non-voting), and the President of the Association (non-voting). Board members are from the NSDA membership, and the criterion for active membership requires that a person or firm be engaged in the manufacture and marketing of soft drinks in the United States or its possessions.

The NSDA Board does not have any "representatives" of Coca-Cola or Pepsi-Cola if that term implies that such Board members are acting on behalf of the owners of those trademarks. NSDA Board members are licensed manufacturers of soft drinks including Coca-Cola and Pepsi-Cola as well as Dr Pepper, Seven-Up, RC Cola, A&W Brands, Cadbury Schweppes, and/or other familiar brands of soft drinks.

Article IV, Section 3 of the NSDA Bylaws provides that Board composition will, to the extent practical, be balanced by size of company, brand, and geography. Of the twenty voting members of the Board, an analysis of the types of soft drinks manufactured and/or distributed by brand is as follows:

Dr Pepper: Fourteen members
Seven-Up: Nine members
Coca-Cola: Seven members
Pepsi Cola: Eight members
Royal Crown: Four members
Cadbury Schweppes: Seventeen members
A&W Beverages: Nine members

As illustrated in the above, a typical NSDA member manufactures more than one trademark brand of soft drinks. Generally, that typical member would not manufacture more than one of the same type of soft drink, i.e. one cola, one lemon-lime, one root beer product. As a result, a member might manufacture a cola product, Dr Pepper, Seven-Up, and several other types of soft drinks.

QUESTION 3: You stated that local and smaller chains prefer loaned equipment rather than other promotional programs such as dollar rebates. Taking this into account, is it now the standard practice of large manufacturers to target the free dispensing equipment program towards smaller and independent retailers?

ANSWER: Not all small accounts participate in a loaned equipment programs. We do, however, seek to satisfy our customers' needs. Those needs may range from marketing and advertising assistance to equipment installation.

We view the entire fountain dispensing market as being open for competition. This means our existing and potential customer base is made up of both large and small retail outlets. Loaned equipment is not offered to retail outlets as simple inducement to do business. There are many factors taken into consideration by us as distrbutorss and by retailers as buyers. First and foremost is the quality of our beverage products. An inferior beverage product, even with free equipment, will do great harm to a retailer's business. Second you have an excellent service record. A retailer will not tolerate product deliveries which are too late or equipment which is consistently faulty simply because it is free.

We have no "standard practice" to target small retail outlets. Our goal is to satisfy our customers needs. This includes our large as well as small customers. And because their needs may vary, our approach can be customized.

QUESTION 4: You stated in your testimony that 85% of free dispensing equipment is installed in accounts of less than 1500 gallons of syrup per year, and that the profit margin for major manufacturers under these programs is very small. If this is true, then why are major manufacturers so actively involved in promoting and extending these programs to small and local retailers and restaurants?

ANSWER: Pepsi-Cola Bottling Company of Milton has been in business for more than 100 years. Some of our customers have been with us for almost as long. We are not in business for the short term. In our effort to encourage continued patronage, we have elected not to take a "cookie cutter" approach to doing business. Consequently, margins on certain accounts may vary based on total volume, length of contract or potential for business success. The profit margins for small retail outlets are notoriously small and the failure rate is already uncomfortably high. Suppliers who attempt to charge high, exorbitant prices for their products or services will quickly find themselves without customers. This is a simple economic fact for the retail food business.

QUESTION 5: Even though the profit margin with small and local retailers is not as great as your other accounts, would your dominance of that market prevent smaller soft drink manufacturers from competing with you effectively?

ANSWER: The success of our business is not based simply on the "availability" of our products. It is based on strong consumer preference and excellent service, one ability to compete effectively is, in fact, hampered.

Our position in the market place and our relationship with retailers and consumers has been earned by decades of hard work, competitive pricing, and quality products. The industry remains open for all to compete.

QUESTION 6: Have you ever terminated a contract for the use of loaned equipment to a retailer? If so, for what reasons was the service terminated? Do you know of any manufacturers who have terminated such a contract?

ANSWER: My firm is not a major player in the loaned equipment program. Contract termination does occur. Most frequently the cause in non-payment of debt or the retailers preference for another supplier.

QUESTION 7: Do large manufacturers such as Coke and Pepsi, manufacture their own dispensing equipment, or do they purchase from independent manufacturers?

ANSWER: Neither Pepsi-Cola Company nor any of its independent bottlers, manufacture dispensing equipment. This equipment is purchased from specialized manufacturers.

QUESTION 8: Is the practice of providing free dispensing equipment an element of competition between Coke and Pepsi? If so, what effects would S. 114 have on this competition.

ANSWER: Is is one element of fair competition, which has helped to address specific customers' need. S. 114 would institute a policy of helping a small group with narrow interest at the expense of retailers and consumers. Clearly, it would prohibit competition among soft drink manufacturers and distributors with respect to how our products are distributed. It would be hard to envision anything other than a negative impact on the retail consumer.

Very truly yours,

Drew M. Davis
Director
Congressional Affiars

Senator INOUYE. Thank you very much. You have spoken about the process of competition. If this process should result in Pepsi and Coke being the only competition in the soft drink business as the evidence seems to indicate would that be sufficient from a competitive viewpoint?

Mr. MEIGHER. Well, of course, we do not concede that that result would occur.

Senator INOUYE. Well, it is getting close to that.

Mr. MEIGHER. I think there are a couple of things that one should bear in mind, and that is that it is very easy for us to use a shorthand as we talk here and to talk about Coke and Pepsi.

The truth is that in the marketplace there are a lot of entities in all local markets, and there may be a plurality of people representing and purveying Coke and/or Pepsi products. And there is a difficulty in the ability of the franchise companies—and perhaps it is a salutary difficulty—in controlling what is going on in the local market.

Competition is prevailing in the local market, and things are not as monolithic or controlled as one might think.

The other thing is that the FTC was saying earlier today that when they have examined this market in many cases what has stopped them short of proceeding is their perception that there is ease of entry, and I think if one assumes, which you have assumed, namely that the market would become further concentrated and that the remaining two companies became less competitive, then if their prices drifted upward on a sustained basis, entry would be pretty easy for a newcomer.

There are a lot of ways for a company that had the resources and capabilities to latch onto distribution that is out there in the food business and to latch onto sources of extract. One would not have to totally invent the process from top to bottom and come in as a fully integrated company. One could find a lot of entities at all levels in the food industry that could help that.

Senator INOUYE. Theoretically so, but does it ever happen here?

Mr. MEIGHER. Well, it has not happened yet in the soft drink industry because——

Senator INOUYE. Because it will not happen?

Mr. MEIGHER. Because of the severe competition that prevails in the industry. But there have been other industries where after periods of concentration people have entered and undermined somebody who had a very, very strong position.

Senator INOUYE. Do you ever in your promotional practice commit the retailer to sell any product he wishes?

Mr. MEIGHER. Well, I think the retail—you are talking about Coke and Pepsi, the Coke and Pepsi bottler, and I take it you are not talking about me as a lawyer in my practice.

Senator INOUYE. Well, obviously you are not here as a bottler.

Mr. WEBSTER. Competition would dictate that, Mr. Chairman, if a customer—if we went to a customer and tried to solicit his business and he said to us the only way you can have our business is you would have to have one valve, we will say, for Seven-Up. We could either walk away from the business and then somebody else would get it, or we could make that judgment at that point if we felt there was enough there to offset our costs, our investment. So that

would be done on those types of bases, but it would be done on a competitive basis.

Senator INOUYE. And you have done that?

Mr. WEBSTER. We have done that.

Senator INOUYE. Very often? Once? Twice?

Mr. WEBSTER. No. Seven Eleven is a good example. Seven Eleven food stores, they have Pepsi on their fountain, they have Seven-Up on their fountain, they have Dr. Pepper, they have Coca-Cola. MacDonald's up until recently—I do not have MacDonald's, but I know they have Coca-Cola and I know they had Seven-Up until recently. They had that for many years.

Burger King, which we have, has had a different orange up until a couple of years ago, and that fluctuates. Right now there are different flavors in Burger Kings. So, no, the free market will dictate that.

Senator INOUYE. Yours is a very American practice?

Mr. WEBSTER. Yes, and we are not ashamed of what we do, and we are very competitive, and we are not the dominant syrup manufacturer in our marketplace.

Senator INOUYE. All right, thank you very much, Mr. Webster.

Mr. Gorman.

STATEMENT OF MARK GORMAN, SENIOR DIRECTOR OF GOVERNMENT AFFAIRS, NATIONAL RESTAURANT ASSOCIATION

Mr. GORMAN. Thank you, Mr. Chairman. We appreciate this opportunity to share the views of the National Restaurant Association on S. 114.

My name is Mark Gorman. I am the Senior Director for Government Affairs for the association, and we are the leading trade group for the food service industry which is comprised of over 600,000 units across the country. Most eating and drinking places are small businesses. About 70 percent have annual sales below $500,000.

The average profit margin in our industry is less than 5 percent, which sounds comparable to a witness on the previous panel representing one of the beleaguered bottlers and who also claimed that it should not be any problem for the average restauranteur to bear the cost of leasing equipment if he currently renting or if he is currently benefitting from loaned equipment, and so we are in a tough and highly competitive business.

I would like to testify not to much on the technical antitrust law aspects of the legislation, but on the economic impact on our industry, the restaurant industry, its likely effect on the quality of the products that we serve our customers and the fact that it singles out just one among many similar promotional tools for prohibition.

Unfortunately, Mr. Chairman, after consulting with our board of directors, I have to inform you that the National Restaurant Association opposes S. 114, and I also have to admit that it is uncomfortable for us to be in the middle of a dispute between two segments of the soft drink industry, both of which serve the restaurant industry very well. But my job, of course, is to represent the best interests of the association's food service membership.

The primary reason that the National Restaurant Association opposes S. 114 is its economic impact on operators, prohibiting the loan or discounting of dispensing equipment would obviously increase some restauranteurs capital outlays for equipment. With advances in dispenser technology, equipment costs can run as high as $2,500 to $3,000 per unit, which is a price many small operators cannot afford up front.

Smaller restauranteurs who want to provide top quality soft drinks but who are unable to absorb such steep equipment costs would be at a competitive disadvantage with larger, more highly capitalized operators, cutting off their access to equipment, whether it is loaned or provided in a package deal by soft drink manufacturers would probably force many of them to turn to cheaper equipment that provides a less satisfying product. And restauranteurs again, especially those who operate smaller restaurants, often do not have the cash flow to pay for frequent servicing. Since servicing is extremely important to meet health standards and provide a quality product, these operators would be hit hard by the constraints of S. 114.

Quality equipment and proper servicing, as you know, are often included in the total package offered by soft drink manufacturers for a fair per syrup gallon price. These incentive programs have been important to us in delivering a high-quality product, as have the continued research and development funds that manufacturers continuously invest in improving soft drink equipment.

Mr. Chairman, the packaging of dispensing equipment, soda syrup and a regular servicing contract at a competitive price we believe is a legitimate marketing tool and one that suppliers have found to be an effective way to compete for restaurant business. S. 114 unfairly focuses, we believe, on the marketing of soft drink dispensing equipment to the complete exclusion of other similar promotional subsidies which presumably are legitimate in the eyes of the law.

Other types of products might include bottled water and the dispensers that go along with it, point of sale sandwiches which often come with ovens for heating, coffee services—I am sure you probably have one in your own office that has a machine and a frequent delivery of coffee and other components.

The logical extension of the bill, I suppose, would be to regulate all commercial promotions which ultimately and whether it would carry to that extent or not or whether we are just limited to soft drinks alone, we believe it would limit competition to purchase price alone, and that is a limitation on competition.

In conclusion, the National Restaurant Association urges you, Mr. Chairman, to consider the economic effect on small businesses and on consumers of the legislation which you propose, and we would urge you to weigh the adverse effects that increased costs will have on product quality as well as the aspect I just mentioned, which is the fairness or unfairness of singling out and prohibiting just one legitimate promotional activity while allowing many others to exist. Thank you, Mr. Chairman.

Senator INOUYE. Thank you, sir. So, you are telling the committee it should not be our concern whether a consumer has a choice as long as he has some cola?

Mr. GORMAN. Senator——

Senator INOUYE. If he has Pepsi or Coke, but if somebody wants something else and it is not available, that is his tough luck?

Mr. GORMAN. Mr. Chairman, I would have to say that it is the business of the restauranteur to be concerned about the choice to the consumer and the desires of the consumer. I do not think there is anything that a restauranteur is more sensitive to or concerned about.

Senator INOUYE. But under the practice it is either Coke or Pepsi.

Mr. GORMAN. Yes, in many cases it is, certainly.

Senator INOUYE. So, if I went in there and I wanted Dr. Pepper as some of the T.V. ads suggest I should, I cannot get it.

Mr. GORMAN. I suspect there are many restaurants that do not carry Dr. Pepper. A lot of restaurants, of course, carry a wide variety of soft drinks, and I guess you probably know which restaurants carry Dr. Pepper by now if that were a strong choice of yours.

Senator INOUYE. I do not think there is one in Washington. I thank you very much.

Mr. Gottlieb.

STATEMENT OF BERNARD GOTTLIEB, PRESIDENT, MULTI-FLOW DISPENSERS

Mr. GOTTLIEB. Good morning, Senator Inouye. My name is Bernie Gottlieb, and I am a partner in Multi-Flow Dispensers located in Huntington Valley, Pennsylvania.

First, I would like to clearly separate myself from the other people at this table because I am not opposed to S. 114. I am definitely a proponent of S. 114.

I would like to answer some of the questions that you have asked to the panel here and some of the thing that have been stated. One of the things that was stated by the gentleman to my left from Pepsi Cola and from the National Soft Drink Association states that Seven Eleven, Burger King and MacDonald's all offer competing products.

I respectfully suggest to you that these accounts all own their own equipment and have the ability to make their own choices. They are not offered free equipment and have not been offered free equipment.

The gentleman from the National Restaurant Association has most learnedly told us that the majority of their membership are small restaurants.

I would suggest to you that those are particularly the type of accounts that up to now have not been offered free equipment by the major companies. However, today they are selectively being offered free equipment by the major companies.

This is not a case of one price for all. This is a case of where the shoe fits, let us put it on.

My company is in the business of leasing beverage dispensing equipment to bars and taverns. I am second generation in the business, and it is my hope to be able to pass the business on to a third generation, some of which are sitting in this room.

However, the Coca-Cola and Pepsi Cola companies' beverage dispensing equipment giveaway programs to totally monopolize the soda fountain market are making this a distant dream.

The list of companies on list number one consists of companies that used to be major players in the beverage industry, which is the Philadelphia marketplace and in my lifetime. They are A-Treat, Frank's, Booth, Puerto Rico, Dad's Root Beer, Cliquot Club, Gruber's, Hires Root Beer, Bireley's Orange, and Hoffman's.

I am sure that if you utilized your memory for your own local area, you could add to the list. On this list Booth, Puerto Rico, Cliquot Club, Gruber's and Bireley's Orange no longer are in existence, and the others play a very minor part in my local area.

The second group of companies now well known to each and every one in this room will probably join the first group if Congress does not take steps to save them. They are Seven-Up, Canada Dry, Royal Crown, Dr. Pepper, and Sunkist.

What will the world be like—and I mean the world, not just the United States—with only two major companies controlling the beverage industry on a global basis?

Without competition what will we pay for beverages then?

Senator PRESSLER. On that chart, I would like to ask a question. I can never get Diet Seven-Up. There is always Diet Coke and Diet Pepsi, but they have caffeine in them, and I like Diet Seven-Up when I go to these cocktail parties around town. Why is it that that one is more difficult to find?

Mr. GOTTLIEB. The reason probably is the restaurant or the place that you are patronizing potentially was not offered the choice as to what flavors they could serve to serve their customers' needs.

Senator PRESSLER. But there are all these catered events around Washington and I have to go to one or two of them a night, I always ask for Diet Seven-Up, and invariably they never have it. They always have Diet Coke and Diet Pepsi. What is the reason for that? Does anybody know?

Mr. WEBSTER. The reason is, the person doing the catering did not ask to have Diet Seven-Up served.

Senator PRESSLER. I suspect the person doing the catering probably did not think of it. But I find a lot of people say the same thing. It is very hard to get a diet drink that does not have caffeine in it at all of these events, here, there and everywhere.

What is the reason for that? I think that Diet Pepsi and Diet Coke have some kind of a close relationship with somebody, or am I completely off-track here? That is a mystery to me.

Senator INOUYE. We will try to unravel the mystery, Senator.

Mr. GORMAN. If I could respond just from the aspect of the food service industry, which involves catering as well as restaurants and other types of food service, demand has an awful lot to do with the products that are stocked and served, and I mean, I really do reject the notion that somehow restaurants and other food service operators are held hostage by Coca-Cola and Pepsi-Cola and forced to serve only a certain limited product line. It is very impractical for a restaurant to stock a dozen or 15—I cannot count up all of the products on that chart.

Senator PRESSLER. I just want Diet Seven-Up to compete head to head with Diet Coke and Diet Pepsi. They always say, we have got Diet Pepsi and Diet Coke.

Mr. GORMAN. I think our people respond to demand for the product that they serve, and often they serve comparable types of products, although you may not think so. I think if they knew there was a Senator there who was asking for it they probably would have stocked it.

Mr. WACH. Senator, I can address that in a little more depth. In fact, when I get into my testimony, I will probably be able to provide some examples of how this occurs.

Because of this current state of affairs with the giving away of free equipment, we believe that the consumer really does not get the brands that are most in demand that they purchase in areas outside of this industry where they have a fair choice, and I will address that, I think in my testimony as we get into it for this very nature.

In fact, Diet Seven-Up is the number one noncola diet drink in the United States, but it is hard to find.

Senator PRESSLER. It is very hard to find, and I can assure you, if you go to these—every night in Washington, there are at least five or ten catered receptions, and I always ask for a Diet Seven-Up. They have never got it. I have never found it, but I always keep asking.

I bet you could go to all the restaurants on Capitol Hill and order a Diet Seven-Up today and they would not have it. You can find it here and there and you can buy it if you look around a little bit, but it is very hard to get in Washington, D.C. at these catered events.

There is something going on other than consumer demand, I can tell you that. I am smart enough and old enough—I am not that smart, but I am smart enough to know there is something strange about that.

Senator INOUYE. I can assure you, Senator, you will be receiving a case of Diet Seven-Up.

Mr. GOTTLIEB. Senator, it is also my hope that there are 100 other Senators with the same taste.

What other private industry has only two companies controlling nearly 80 percent of the market? The two major companies—Coca-Cola and Pepsi—have used the give-away of equipment advertising items, merchandise and anything else that they could use to gain the whole pie. They are not happy with their near-80 percent share of the marketplace. They want it all.

A free market trade allows rivals to compete on a fair basis. Long ago our government recognized the economic evil of monopolies. My company will not be able to survive if it has to compete with free equipment or equipment sold or leased below its cost. It is very tough to sell against someone who, in the short run, the other guy is rich enough to give away everything that you have to sell.

Senators, I respectfully suggest that you people would have a hard time winning an election if your opponent was buying the votes with give-aways and things along those lines.

Senator PRESSLER. I am going to have a tough time this year, then.

Mr. GOTTLIEB. Even when these majors charge for their equipment, their collection of accounts receivable is deliberately poor or nonexistent, so that on the one hand they ostensibly charge for the equipment, and on the other they fail to collect the charge. The result is the same—free equipment.

One may ask, how does this predatory pricing and unfair competition benefit the ultimate consumer? Rest assured, the consumer does not benefit at all. On the contrary, the opposite has happened.

When was the last time that anyone in this room ever received a free soft drink, or noted that the price of a soft drink was lower than it was the year before, even though the business you are patronizing has received free soft drink equipment? When was the last time you had a choice, other than being able to drink, of ordering a competitive brand in the same restaurant?

If you walk to Union Station, not two blocks from here, you will see what I have portrayed. Try to get a Seven-Up, a Diet Seven-Up, or a generic brand of lemon-lime like I manufacture. It is impossible. It is impossible for me to try and sell my products to these accounts, or to large volume locations, because of the majors' control of the marketplace.

What I am left with is only the small-volume accounts. These accounts used to be too small for Coke and Pepsi, but now the majors, who control the large volume accounts, have shifted gears and are offering free equipment to selected small retail outlets.

Just last week, I lost two small-volume bars in South Florida using approximately 100 to 200 gallons of all flavors per year, far below the high figures that we have heard here today of 1,500 gallons per year being a small account. I lost these accounts because they were offered free equipment by the Pepsi-Cola Company. Like two rogue elephants, Coke and Pepsi are rapidly destroying what little competition is remaining in the soda dispensing market.

In closing, I urge your support of S. 114 to enable the normal check and balance of independent business to work. Our industry is dominated by two giants who, it appears, will not be satisfied until they control it all. Many people earn their livelihoods from this business. Please assist them in keeping their jobs.

Thank you for this opportunity to speak.

Senator INOUYE. Thank you very much, Mr. Gottlieb, and now our final witness, Mr. Wach.

STATEMENT OF RICHARD WACH, VICE PRESIDENT, DR PEPPER/SEVEN-UP COMPANIES

Mr. WACH. Good morning, Mr. Chairman. My name is Richard Wach. I am a vice president in charge of the fountain food service business for the Dr Pepper and the Seven-Up Companies. We appreciate the opportunity to be here this morning and testify on the matters encompassed in S. 114.

Dr Pepper and Seven-Up testified in the 100th Congress regarding the predecessor version of this legislation, and we are pleased to appear before you today. The Dr Pepper/Seven-Up Company manufactures soft-drink concentrates and finished fountain syrups. These syrups are sold to food service operators to produce soft drinks in finished form to food service customers.

Mr. Chairman, we commend you for introducing legislation to address a mounting problem in the fountain soft drink segment of our industry. The practice of providing soft drink dispensing equipment to food service operators around the country either free of charge or more commonly for some reduced lease rate or other form of consideration is in fact increasing.

Frequently, a major fountain soft drink syrup manufacturer will supply equipment on the condition that the recipient agree to a contractual limitation on the dispensing of competitive products. These restrictions often prohibit the food service operator from offering more than one brand manufactured by a competitor of the company providing the equipment. The remaining four or five fountain valves may only be used for the brands of the company supplying that equipment, and this practice is common and occurs throughout the United States.

For example, a food service operator may be required to serve only Coca-Cola brands such as Coke, Diet Coke, Sprite or an orange flavor on its Coca-Cola-supplied piece of equipment. It may be free to sell one nonaffiliated brand like a Dr Pepper or a Seven-Up, but not both.

Now, to show how this works, I would like to read briefly into the record a paragraph from the Coca-Cola Equipment Lease program. It says that "The lessee acknowledges that the rental rate set forth herein does not fully compensate the company for its expenses concerning its research and development efforts designed to improve fountain equipment, or in providing this equipment to the lessee, and that the company provides the equipment to the lessee for the purpose of dispensing company products.

"Therefore, the lessee agrees that if the equipment is a post-mixed dispenser then the equipment will be used for the purpose of dispensing Coca-Cola, Coca-Cola Classic, Diet Coke and other post-mixed products of company, with the understanding that one valve, if the equipment has four or more valves, may be used at the lessee's option for dispensing a noncompany, noncola post-mixed product."

Now, this is their intent. This is stated in their lease agreement. How does this actually translate into the real world? Two weeks ago in my office I received a call from an independent small restaurant operator in the Midwest. He had been presented our brands—Dr Pepper specifically, in this instance—and he was sold on the benefits of those brands. He acknowledged that his customers wanted it, asked for it consistently, but he was concerned that he could serve it based upon equipment ownership.

We in fact, as part of our sales policy—show this—asked the operator to take out their lease agreement and the sale was closed and the product, Dr Pepper, was in fact installed.

Two weeks later, he received notification from his supplier that because he had made the brand available, he would now have to pay a monthly rent on that piece of equipment and he would no longer obtain free service.

I think this highlights this situation of giving away free equipment. This is stated policy, and the situation I just expressed is what we oftentimes find in the real world.

We believe that these restrictions have a negative impact for consumers of soft drinks for the bulk soft drink segment of our industry. Food service operators are being effectively coerced, in our opinion, into choosing brands of fountain soft drinks based upon the soft drink dispensing equipment considerations as opposed to making soft drink brand decisions solely on the basis of actual consumer preference for those brands.

The two principal brands manufactured by Dr Pepper/Seven-Up are among the ten most popular consumer soft drinks in the United States, yet it is often difficult to sell our products to food service operators despite this demand because of the operator's commitment in obtaining this free equipment from the major soft drink companies within our industry, and because regular and diet colas account for as much as 70 percent of fountain sales through a single location, Dr Pepper and Seven-Up—we do not have a cola, so therefore we do not have the volume to begin providing any type of reduced rate or free equipment, and more significantly, we believe that food service operators should make their decisions on the merits of the brands as reflected in customer appeal, not on the basis of attractive equipment offers. When allowed to compete on the merits of our brands, as we do in nonfountain markets, Dr Pepper and Seven-Up brands, including Diet Seven-Up, are demonstrably popular and very successful.

Mr. Chairman, your bill, S. 114, seeks to prevent major soft drink companies from obtaining an unfair advantage in fountain distribution by providing equipment at no charge or at a reduced rate. It would improve competition in both the fountain equipment and the soft drink industries, and what is more significant is that it would enhance the ability of consumers to receive their favorite soft drink brands.

Thank you.

[The questions and answers follow:]

Responses of Richard Wach
Vice-President, Dr Pepper/Seven-Up Companies, Inc.
to Post-hearing Questions of Chairman Inouye

QUESTION #1

Do any of the companies you represent manufacture or sell dispensing equipment? If not, why not?

ANSWER

The Dr Pepper/Seven-Up Fountain Division does not manufacture or sell any type of fountain dispensing equipment.

Since colas will typically enjoy as much as 70% of the volume sold through a foodservice account, Dr Pepper and Seven-Up brands as non-colas do not generate enough volume to justify provision of equipment. It is not our business, and the non-cola volume would not make that effort economically viable for us.

The Dr Pepper and Seven-Up Companies work closely with most major manufacturers of fountain soft drink dispensing equipment to ensure that equipment being developed and put in the market place is of sufficient quality and capability to produce high quality finished soft drinks.

Our research and quality control labs thoroughly test equipment and work closely with manufacturers to recommend possible modifications or improvements.

QUESTION #2

Has Dr Pepper or Seven-Up ever provided dispensing equipment for free or at reduced prices to any of their customers? If so, please describe those programs?

ANSWER

The Dr Pepper/Seven-Up Fountain Division has programs to assist their bottlers in the purchase of postmix dispensing equipment that carry the Dr Pepper or 7UP logos. The purpose of this program is to provide a merchandising/ advertising medium for our brands.

This program involves providing a small quantity of product (DR PEPPER or 7UP syrup) free of charge for Dr Pepper and some cooperative financial help for Seven-Up to help defray the cost of customizing the equipment with our brand logos. This free product or funding is provided on a one time basis and though it makes business sense that our brands be dispensed through this equipment we do not require this as a basis for taking advantage of this program, i.e., there is no exclusivity.

QUESTION #3

Have you detected any difference in the sales of your syrup between retailers and restaurant owners that own or lease their dispensing equipment and those that are provided below-cost equipment by manufacturers of Coke and Pepsi?

ANSWER

As stated in my testimony before the Subcommittee, two of our brands are in the top 10 most popular soft drinks in the United States. In situations where a foodservice operator (retailer) owns equipment or leases it without restrictions we have achieved significant success in getting the foodservice operator to make our two leading brands available, and sometimes additional brands of ours, as well. Foodservice operators in this situation have been able to offer consumers the most popular choices in each soft drink flavor segment.

This situation does not exist where the foodservice operators are provided free or leased equipment at reduced cost. We also estimate that this scenario covers as much as 70% of all postmix dispensing equipment placed in the industry. Some lease agreements, such as the one I offered for the record before the Committee, state that one valve of this equipment can be made available to dispense a competitive product. Sales representatives from our companies must spend considerable effort and time educating retailers as to this fact. Even if we are successful in placing one of our brands, we have little or no chance of placing two or more, even if these brands are demonstrably more popular than competitive products.

Additionally, as stated in my testimony, many foodservice operators who make one of our brands available are the targets of varying degrees of intimidation designed to coerce them to remove our product. This intimidation takes

various forms with the most common being that the foodservice operator will have to pay rent or will no longer be eligible for free repairs or other services.

In the former group, foodservice operators which own their own equipment can--and do--make brand set decisions based on consumer preferences. In the latter, with few exceptions, those that receive equipment have their brand sets dictated by the equipment supplier.

QUESTION #4

Can you point to any specific evidence of contractual agreements by Coke and Pepsi that require restrictive or exclusive use of their products?

ANSWER

Attachment I is a copy of the Coca-Cola USA equipment lease agreement that I mentioned in my testimony. Paragraph 7 ("Use of Equipment") states that only one valve can be used to dispense a competitive non-cola, non-Coke flavor.

One way that Coca-Cola USA discourages placement of Dr Pepper/Seven-Up brands is to claim that we are affiliated with the Pepsi-Cola Company. While this claim is false it often has the intended effect on the foodservice operator.

Attachment II is a financial proposal recently presented to a foodservice chain account located in the upper Midwest. This proposal to obtain soft drink exclusivity contains two parts that directly discourage the foodservice operator from serving a competitive soft drink brand:

Equipment

"CCUSA lease to be $150 pr machine"
"Locations with Dr Pepper or another competitive flavor lease to be $300 per machine."

This section clearly targets Dr Pepper by making it significantly more expensive for the foodservice operator to serve a competitive soft drink brand.

Product Availability

"Any competitors flavor serviced during term then $.75 paid to Coca-Cola"

Here again, the foodservice operator is being intimidated by having to significantly increase costs in making Dr Pepper available to their consumers.

This type of proposal is common but for obvious reasons it is often difficult to obtain written documents.

QUESTION #5

Does Dr Pepper or Seven-Up allow its customers to handle and use competing flavors and syrups?

ANSWER

In the bulk soft drink market, Dr Pepper and Seven-Up both allow their customers (bottlers, wholesalers and customers) to handle competing flavors such as Sprite or Slice without restrictions. Some of our franchise bottlers also act as Sprite or Slice distributors and in many cases actually distribute a greater volume of the competitive product than they do of our brand.

QUESTION #6

If S. 114 is passed, do you think it will result in higher overall costs of fountain syrups and beverages to retailers? Are those increased costs, if any, likely to be passed on to customers?

ANSWER

We are confident that if equipment giveaways are ended within our industry that it will not have a negative impact on foodservice operators or on consumers. To the contrary it may have a significant positive effect.

We empathize with and understand the risks and challenges faced by the small business operator. That operator must make a significant capital expenditure to open a business. A normal lease expense and/or purchase of fountain postmix equipment will add somewhat to start up costs. However, the cost of equipment on a per drink basis would be merely tenths of a cent.

Senator INOUYE. Thank you very much, Mr. Wach. I wish I could stay a little longer, but I am due at another hearing in two minutes, and so if I may I would like to submit additional questions to all of you.

All of you have been extremely helpful, but obviously this will not be an easy matter for the Committee to resolve. The pressures will be great, for and against. I hope that this Committee will have an opportunity to discuss this in Committee and resolve once and for all as to what we will do.

I do not think it is fair to all concerned here to have a measure being brought up every year just for the sake of having hearings, and so I can assure you that every effort will be made to bring this matter up for consideration one way or the other this year. I have no idea as to what the outcome will be, but we will see.

With that, I thank you all for participating this morning and I look forward to seeing you when we further consider this measure.

[Whereupon the Committee adjourned at 11:30 a.m.]

[The following information was subsequently received for the record:]

TESTIMONY OF
WILLIAM V. EATON
SENIOR VICE PRESIDENT
CINI-LITTLE INTERNATIONAL, INC.

I am the Senior Vice President of Cini-Little International, Inc., a design and business consulting company with nine offices located in the United States and Canada and performing services to the foodservice, lodging, health care, and related industries throughout the world. In our professional capacity as design consultants, we not only plan foodservice facilities but also specify the equipment which fit the plans and hence the goals of our clients. It is important to recognize that while our clients may be architects, developers, or operators, the real recipients of our expertise are the people who dine in the various facilities which we have planned.

Methodology

Our method of operating includes developing a program for the facility which we are to design which includes accumulating all of the data with regard to who will be utilizing the spaces and what the marketplace demand is for services. We either obtain proposed menus from our clients or we develop menus for the facilities to be planned. Once this data is collected and analyzed, a space plan is developed to meet the market requirements and to ensure a smooth and harmonious understanding of the facility by ultimate clients.

Once the preceding process has been completed and approved by our client, we begin the process of selecting the various items of equipment required to accomplish the menu and meet the requirements of the ultimate consumer at the facility. Our selection process for each item of equipment is predicated upon a number of specific determinations including but not limited to the ability of the chosen piece of equipment to meet the requirements determined in the programming and planning phase; the reputation of the manufacturer for reliability and service-free operation of the equipment he manufactures; the presence of reputable, effective, and rapid service capabilities in the area in which the facility is located; and a credible and knowledgeable representative for the product to train operator's staff relative to the equipment.

Once the equipment has been selected and approved by our client, usually item by item, we prepare the electrical, mechanical, and plumbing plans showing the exact location of the items and utilities plus interconnecting line runs between various pieces of equipment. We provide these documents to the architects and engineers on the project so that their planning process can continue.

Substitutions

We normally, unless directed otherwise by our clients, specify precise items of equipment that we and the client have decided best meet the needs of the project, and because of the special requirements of various items of equipment relative to size, utility requirements, and interconnecting runs, we do not allow substitutes under our specifications. The reason for this is simple. When substitutions are made, it often necessitates changes to the electrical and plumbing requirements which often lead to changes in electrical wiring sizes, circuit breaker sizes, and other changes for the electrical portion as well as piping changes and possibly size changes in the facility being built. Recognizing that often substitutions are suggested by foodservice equipment dealers, we include in our specifications requirements that the contractor who suggests substitutions must, at his expense and as part of the substitution, assume all responsibilities and liabilities relative to the overall change. This may include moving walls, changing mechanical, electrical, and plumbing rough-ins or points of penetration; plus changing the interconnecting piping and wiring, circuit breakers, and whatever else it takes to make the finished facility work properly without increasing the cost to the owner.

Undue Interference

We have been concerned for some time by a practice initiated by Coca Cola and Pepsi to provide their equipment directly to owners at little or no cost for the basic equipment. The reality is that the offer when made does carry the requirement that only Coke or Pepsi products can be used with the equipment being supplied. This has been true for years in a number of areas such as ice cream manufacturers supplying ice cream cabinets, coffee suppliers supplying coffee urns and the like. For the most part, these two producers of

products use standard items of equipment that can easily be replaced by another standard item of equipment if necessary; however, it does often cause size and other problems previously identified.

The problem in the soft drink industry has been that one major syrup manufacturer has for a number of years been offering their equipment to owners at a substantial reduction in cost or at no cost whatsoever except for the increase in the cost of syrup to the owner plus a requirement that no other manufacturer's syrup can be used in the system. This has a number of adverse effects which unsophisticated owners often miss.

1. The ultimate consumer of the product; i.e., soft drinks, often has diverse likes and dislikes and may well elect to dine elsewhere if the product of his choice is not available. While to many, the differentiation between Pepsi Cola, Coca Cola, Royal Crown Cola, or 7-UP and the like may not be substantial, to many people in the marketplace it is terribly important and hence when one product is not available they do seek other solutions. These solutions often include finding another place to dine.

2. The syrup manufacturers often provide free service to the owner on equipment that the owner may use as long as the owner purchases syrup from them. Coca Cola, the supplier in question in this case, frequently refused to service equipment not provided by them. As a result, they have been instrumental in having dispensing equipment removed and replaced with their own firm's products or products preferred and approved by their firm. The reason seldom seems to have anything to do with the quality of either the equipment originally supplied or the finished product being served to the customer but rather seems more aimed toward supplying products that they control so that the syrup will continue to be purchased from said producer. The result is that the owner then is erroneously led to believe that the product removed was an unsatisfactory one and that not only the manufacturer who provides said equipment but the consultant who specified it did him a disservice.

3. When free equipment or reduced price equipment is offered by the manufacturer, it is often without any real understanding of the problem which will be caused by the installation of the free equipment in lieu of equipment which was originally specified. This has happened time and time again where the client has accepted the offerings of the free equipment only to find that the equipment is not technologically capable of providing quality soft drinks at great distances and hence cannot use the piping and other mechanical connections already provided by the base contract. In such instances, other equipment has to be supplied in various locations far from the originally planned location for installation, additional new space has to be created to accommodate the additional equipment, and new utilities have to be run to the new location. All of this to assure that Coke or Pepsi have a lock on the syrup to be used in the location and prevent the client from using the specified equipment which the consultant has selected.

Examples

1. The Smithsonian Air and Space Museum foodservices were planned and specified by Cini-Little International, Inc. The equipment selected for the project was manufactured by Perfection Equipment, Inc. During the process, Coca Cola, USA approached the owner and operator and suggested making a change which they accepted without recognizing that the installation would not be completed as originally planned and that other space would have to be made available for equipment to service the outlying areas. Turmoil and additional cost involved in this process were substantial.

2. St. Paul Companies employee cafeteria in their new headquarters building in St. Paul, Minnesota, was planned and specified by Cini-Little with a remote soda system manufactured by Perfection Equipment., Inc. During the construction process, the syrup producer proposed to the operator and then to the owner that their "free" equipment be substituted. The resulting change required changes to the architectural and engineering documents, the equipment detail documents, shop drawings, and our documents, all at considerable expense. While the installation

and operation are still 12 to 18 months off, there can be little doubt that the substituted equipment will dispense a beverage of both lower quality and less consistency due to the limited chilling and carbonation capacity.

3. Ice Dispensing Equipment

A parallel and equally frustrating situation concerns the refusal of the two major syrup manufacturers to interface with automatic ice maker/soda dispensing equipment manufacturers. The result is that not only are the soda system manufacturers forced off projects, but the ice maker manufacturers are also. In fact, the two major syrup companies have gone so far as to "certify" manufacturers with whom they will allow their equipment to interface. The resulting changes in equipment during the later stages of a project cause no end of problems relative to project cost, detail, and utility changes, etc. The net result is our clients end up with a dispensing system which does not provide them with the level of quality intended or promised by the consultant.

Summation

We as consultants are hired by foodservice operators and owners directly or indirectly to provide our substantial expertise in the selection of foodservice equipment and the planning of the facilities to maximize the return on investment for the client. Any interference in the process by outside influences such as the two major manufacturers negates or limits our role in the process and gives rise to questions about our credibility in those areas. The fact is that we have specified top-quality equipment which the two major manufacturers refuse to service and are instrumental in having removed time and time again by unsuspecting owners. This is a disservice to the owner and to the public at large and certainly to us as independent and objective consultants with no vested interest in any product. We apply our considerable skills and background to the proper selection of equipment to meet the needs of the project and find it abhorrent that any outside influence with a vested interest should be brought to bear in our selection process solely to monopolize the syrup market.

As bad as that may be, we could more readily accept the suggested syrup manufacturer's products if the process were one of effective selection. But since it often occurs after the project has been finally planned, sent out to bid, the successful contractor selected, and the work begun, it frequently necessitates changes in the field resulting in extra costs to the owner. This is a very poor practice and one which should be stopped without question. The time for selling the product is prior to the issuance of documents for bidding purposes and this eleventh hour sneak attack way of doing business should be stopped since it does not serve our clients or the ultimate consumers in any fashion but rather serves the vested interests of the syrup manufacturer only.

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February 21, 1990

Senator Richard Bryan (D-NV), Chairman
Senate Consumer Subcommittee
U.S. Senate
Room SH-227
Washington, DC 20510

Dear Senator Bryan:

On behalf of the National Licensed Beverage Association (NLBA), representing retailers of alcohol beverages, we would like to request that this correspondence be included in the permanent hearing record for your February 28, 1990, Subcommittee hearing on S. 114, introduced by Senator Inouye (D-HI), seeking to prohibit certain unfair practices by soft drink manufacturers on the distribution of beverage dispensing equipment to retailers.

Mr. Chairman, the NLBA has over the past several years consistently opposed this legislation. We urge the Subcommittee not to report S. 114 to the full Committee. Contrary to contentions of the supporters of this legislation, placing soft drink beverage dispensing equipment in a tavern for no charge, or at a negligible charge, does not create an obligation to purchase the soft drink syrup from the company giving away the equipment. This is just not the case and is contrary to our retailer business practices.

While we have no industry-wide study to detail how many of the over 600,000 retailers of alcohol beverages around the country either purchase or receive free soft beverage dispensing equipment, this practice is an acceptable, normal course of doing business in today's economic environment.

NLBA believes free distribution of these types of equipment is not wrong. We understand that other retail industries receive free products from their suppliers for promotional or marketing use that S. 114 would seek to eliminate.

NLBA is also opposed to this legislation for a variety of other reasons. First of all, consumer demand from our tavern customers determines the type of soda or product mix we purchase for our businesses. Would it not be deceptive consumer practice, or

trademark violations, for a retailer to have a dispensing unit with, say for example, Coke on the outside and then purchase an inferior or other brand of soda syrup product merely to save a few cents?

It is unfair to impose on retailers the restrictive provisions found in S. 114, prohibiting inducements such as accepting signs, supplies, money, services or other things of more than nominal value. What the proponents of the bill ignore is the common practice of a soft drink supplier to assist his tavern owner or retailer in deciding what types of equipment to have in his or her establishment. It is the soft drink supplier who undertakes the research and development on improving outdated soft drink dispensing equipment. It is the soft drink supplier who keeps abreast of new technological advances in equipment for their establishment. There is no need to change this long established relationship through S. 114 between our retailer and their soft drink suppliers.

Finally, S. 114 claims to protect competition within the soft drink dispensing equipment market. To the contrary, by eliminating supplier marketing and promotional support to the retailer, it will reduce profits and hurt retailers. The real victim of this soft drink dispensing battle is the customer.

We believe, that this is special interest legislation, pure and simple. It is unnecessary, and we therefore urge this Subcommittee, the full Committee and Congress to reject S. 114 and not to report the bill out for final consideration.

Sincerely,

Gerald E. Murphy

GERALD E. MURPHY
Executive Director